83-1119

No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

NATIONAL ASSOCIATION OF
REGULATORY UTILITY COMMISSIONERS,
Petitioner,

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

WILLIAM PAUL RODGERS, JR.*
General Counsel

CHARLES D. GRAY
Assistant General Counsel

GENEVIEVE MORELLI
Deputy Assistant General Counsel

National Association of Regulatory
Utility Commissioners
1102 ICC Building
Post Office Box 684
Washington, D.C. 20044
(202) 628-7324

* Counsel of Record

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QUESTIONS PRESENTED FOR REVIEW

The Motor Carrier Act requires a motor carrier which transports property for compensation, *inter alia*, to obtain operating authority from the Interstate Commerce Commission. A shipper transporting its own freight is not subject to regulation by the Commission under the Act. When a shipper leases both equipment and drivers from a single source to transport its freight, the Commission and State regulatory agencies, to properly enforce the requirements of the Act, must decide if such transportation is for-hire carriage subject to regulation or exempt private carriage. With this background, the following questions are presented in this petition:

1. Whether the Eleventh Circuit erred in affirming an ICC "policy statement" which for practical purposes eliminates the distinction between regulated for-hire carriage and private carriage upon which State enforcement of Federal economic regulatory laws is based?

2. Whether the decision of the Eleventh Circuit affirming the ICC's "policy statement" is consistent with this Court's decision in *Drum* that the definitions of for-hire and private carriage contained in the Act must establish practical and enforceable limitations upon private shippers?

THE PARTIES

The parties to the proceeding before the Eleventh Circuit are listed below.

Petitioners and intervenors supporting petitioners were as follows:

American Movers Conference,
American Trucking Associations, Inc.,
Bowman Transportation, Inc.,
Charter Express, Inc.,
Common Carrier Conference—Irregular Route (now "Interstate Carriers Conference"),
Frank Bros. Trucking Co.,
Hedrick Associates, Inc.,
Import Dealers Service Corporation,
International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,
J. H. Rose Truck Lines, Inc.,
National Association of Regulatory Utility Commissioners,
National Automobile Transporters Association,
National Tank Truck Carriers, Inc.,
North Alabama Transportation, Inc.,
Osborne Truck Lines, Inc.,
Port Norris Express Co., Inc.,
Regular Common Carrier Conference, Inc.,
Ryder Truck Lines, Inc.,
Senn Trucking Company,
Southern Intermodal Logistics, Inc.,
Specialized Carriers and Rigging Association, and
Steel Carriers' Tariff Association, Inc.

Respondents and intervenors supporting respondents were as follows:

United States of America,
Interstate Commerce Commission,
National-American Wholesale Grocers' Association,

National Industrial Traffic League (now "National Industrial Transportation League"),
Private Carrier Conference, Inc., and
Private Truck Council of America

Petitioner National Association of Regulatory Utility Commissioners (NARUC) is a quasi-governmental nonprofit organization. Within its membership are the governmental agencies of the fifty States and of the District of Columbia, Puerto Rico and the Virgin Islands engaged in the regulation of carriers and utilities. More specifically, the members of the NARUC include the State officials responsible for ensuring that motor carriers operating in their respective jurisdictions provide transportation services in a lawful, financially responsible manner.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The National Association of Regulatory Utility Commissioners (NARUC) petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered on October 11, 1983.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, attached as Appendix A, is reported at 716 F.2d 1369 (1983). The opinion of the Interstate Commerce Commission, attached as Appendix B, is reported at 132 M.C.C. 756 (1982).

JURISDICTION

The decision of the Eleventh Circuit was entered on October 11, 1983. This petition was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

Relevant statutory provisions and regulations are set forth in Appendix E.

STATEMENT OF THE CASE

The Motor Carrier Act (MCA) [as codified in the Interstate Commerce Act, Subtitle IV of Title 49, U.S. Code] defines motor common carriers and motor contract carriers as those carriers which transport the property of others for compensation in interstate and foreign commerce. 49 U.S.C. §§ 10102(12) and(13).[1] Under the MCA, a motor private carrier is defined as a carrier transporting its own property. 49 U.S.C. § 10102(14). A carrier transporting goods for compensation (a for-hire carrier) is subject to the regulatory authority of the Interstate Commerce Commission (ICC or the Commission) under the MCA, 49 U.S.C. § 10521, and therefore must, *inter alia*, obtain operating authority from the ICC. Private carriers are exempt from regulation under the MCA, and therefore, need not obtain ICC operating rights. Given the thousands of motor vehicles operated on a daily basis by both for-hire and private carriers, State and Federal enforcement officers must frequently and consistently determine whether an individual fact situation constitutes regulated or exempt interstate transportation.

On February 17, 1982, following notice and comment, the Commission served its decision in Ex Parte No. MC-

[1] Unless otherwise noted, all references to Title 49, U.S. Code are to West Supp. 1982.

122 (Sub-No. 1), *Lease of Equipment and Drivers to Private Carriers*, 132 M.C.C. 756 (1982) Appendix B. In the words of the ICC, the primary purpose of this decision was to redefine "the distinction between private and for-hire carriage in the context of leases of equipment with drivers to shippers." App. B at 26b. In this sweeping decision, the ICC explicitly rejected the "control and substance" test employed by the Commission, the States, and the judiciary for determining whether a lease to a shipper of both the motor vehicle and its driver from a single source constitutes regulated for-hire carriage or exempt private carriage. Under this legal test, a shipper that undertakes such single-source leasing must both control the transportation (i.e., direct, dominate and control the transportation), and assume in substance the characteristic burdens of transportation (i.e., bear the financial risk for the operation of the vehicle, employment of its driver and carriage of its goods) to be classified as an exempt private carrier. Importantly, under this test a given single-source lease was *presumed* to constitute for-hire carriage unless rebutted by the leasing parties. This two-pronged test for drawing the boundary between regulated and exempt carriage was established by this Court in *United States v. Drum*, 368 U.S. 370 (1962).

To replace the longstanding "control and substance" test, the Commission in its February 1982 decision created a new legal standard—the "control and responsibility" test to define the boundary between regulated and exempt carriage. This new test abolishes the presumption that absent rebuttal, single-source leasing arrangements constitute for-hire carriage. Under the test, a shipper need not establish an employer/employee relationship with the driver of a leased vehicle to establish private carriage. Neither must the shipper assume the customary burdens associated with the financial risks of vehicle maintenance or nonutilization.

Petitions for review of the Commission's decision were filed with the Eleventh Circuit in No. 82-5247 on February 26, 1982, and in No. 82-8133 on March 4, 1982, pursuant to 28 U.S.C. §§ 2342(5) and 2344. The cases were consolidated. On April 19, 1982, the Eleventh Circuit granted the NARUC's petition to intervene in No. 82-8133.

Before the Eleventh Circuit, the NARUC argued that the ICC's new test for establishing the boundary between for-hire and private carriage would have a devastating affect upon efforts of State regulatory agencies to enforce the requirements of State and Federal law within their respective jurisdictions. Relying upon this Court's decision in *Drum*, *supra*, holding that the definitions of for-hire and private carriage must "impose practical limitations" upon unregulated competition "in a manner which transcends the merely formal" (368 U.S. at 375), the NARUC asserted that when the ICC's new policy took effect, there would be no practical basis for State enforcement and regulatory officials to determine whether an individual single-source leasing arrangement constituted private carriage or unlawful for-hire carriage.

On October 11, 1983, the Eleventh Circuit issued its decision affirming the ICC. Appendix A. Subsequently, it stayed its mandate pending proceedings before this Court. Appendices C and D. On December 7, 1983, the American Trucking Associations, Inc., *et al.*, filed a petition for writ of certiorari, No. 83-943. On December 22, 1983, Ryder Truck Lines, Inc. filed a separate petition for certiorari in No. 83-1030.

REASONS FOR GRANTING THE WRIT

a. This Case Is Of Exceptional National Importance Because Of Its Critical Impact On The Ability Of State Regulatory Officials To Enforce Lawful Motor Carrier Operations In The Public Interest

In 1965, the Congress enlisted willing States to join the efforts of the Interstate Commerce Commission to enforce the regulatory requirements of the MCA against interstate carriers of passengers and property. Section 1 of the statute—Public Law 89-170, 79 Stat. 648 (1965)[2]—authorized the ICC to enter into cooperative agreements with the States "to enforce the economic laws and regulations of . . . . the United States concerning highway transportation". 49 U.S.C. § 11502(a)(2)(C). Under section 2 of Public Law 89-170, Congress permitted individual States to require that interstate for-hire motor carriers register their Commission-granted operating authority.[3] Specifically, under 49 U.S.C. § 11506, a State may require that interstate common and contract carriers file the following information with its State regulatory commission or department of transportation:

(1) copies of certificates (in the case of common carriers) and permits (in the case of contract carriers) issued by the Commission under 49 U.S.C. §§ 10922 and 10923 (Appendix E at 8e-10e);

(2) a list of motor vehicles operating pursuant to such certificates and permits;

(3) evidence of liability and cargo insurance coverage or qualification as a self-insurer; and

(4) the name of an agent for the service of process within the State.

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[2] Codified at 49 U.S.C. § 11502, see Appendix E at 12e.

[3] Codified at 49 U.S.C. § 11506, see Appendix E at 13e.

The Commission has promulgated regulations implementing Public Law 89-170 (49 C.F.R. Part 1023) which provide the States with a Federally sanctioned mechanism to enforce these registration requirements against interstate motor carriers. Under the enforcement provisions of these regulations, 49 C.F.R. § 1023.103,[4] a participating State may impose criminal and civil penalties against a motor carrier operating within its borders that, for example, performs regulated interstate motor carriage without a certificate or permit issued by the ICC, fails to register its certificate or permit with the State regulatory agency, lacks adequate insurance, operates motor vehicles not previously registered with the State, or fails to designate a resident agent for the service of process. Sanctions imposed by a State for such violations may include fines, vehicle impoundment and criminal prosecution. According to the most recent information collected by the NARUC from its member commissions, forty States apply and enforce the Public Law 89-170 registration requirements against interstate motor carriers possessing operating authority issued by the Commission.[5]

On an operational level, the basic enforcement technique used by the States to monitor operations of all classes and types of motor carriers remains the road check.[6] As

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[4] Appendix E at 16e.

[5] National Association of Regulatory Utility Commissioners, *1982 Annual Report on Utility and Carrier Regulation* (Washington, D.C. 1983) at 759. ("NARUC Annual Report") The forty States: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin and Wyoming. In addition, beginning on February 1, 1984, New York will enter this enforcement program.

[6] State regulation of interstate carriers possessing ICC operating authority is complicated by the fact that two additional categories

the name implies, State enforcement personnel set up road blocks and stop motor vehicles to examine the lawfulness of carrier operations. Regulated and exempt interstate carriers, as well as intrastate carriers, are asked to produce evidence of proper State registration, proper insurance coverage, and resident agent designation, in addition to lawful vehicle size and weight compliance. Many States have extremely active road check programs which result in high levels of fines and arrests for violations of Federal economic law. For example, in calendar 1982, the State of Montana observed a total of 113,826 interstate trucks and buses, uncovering 3,001 violations, resulting in $238,794 in fines. In 1982, Georgia made 1,321 arrests for interstate carriers collecting $311,400 in fines. Iowa arrested 4,208 interstate carriers and collected $177,885 in fines.[7]

In sum, a vast majority of the States have taken seriously their responsibility to enforce the requirements of

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of carriers provide transportation services in and through the respective State jurisdictions: interstate carriers exempt from Commission regulation and intrastate carriers subject to State economic regulation. To enforce lawful and financially responsible exempt interstate carriage, many States have extended the registration and enforcement program established by P.L. 89-170 to exempt carriers. By passing legislation patterned after 49 U.S.C. § 11506 and 49 C.F.R. Part 1023, 27 States have implemented registration and enforcement programs which require interstate exempt carriers such as private carriers to register their operations, to maintain adequate levels of insurance, and to designate local process agents. NARUC Annual Report, at 759.

Regarding intrastate motor carriage, 45 States require that motor carriers providing transportation services within their respective boundaries obtain operating authority from their State regulatory agencies. In addition to issuing intrastate authorities, these State agencies pervasively regulate major aspects of intrastate carriage: operating territories, service abandonments, rates, accounting practices, safety, levels of insurance coverage and even the issuance of securities. NARUC Annual Report, at 773-774.

[7] NARUC Annual Report at 753.

the MCA. Strong State enforcement efforts are sanctioned and encouraged by Public Law 89-170, as well as the National Transportation Policy, 49 U.S.C. § 10101 [8] (NTP), which prescribes a safe, economically sound national transportation system regulated in cooperation with the States and State officials, in which Federal law is "*enforced* to carry out the [NTP]." 49 U.S.C. § 10101(b).[9] Clearly then, such broad and active involvement by the States in the enforcement of Federal laws as specifically and explicitly authorized and encouraged by Congress creates an issue of national significance and importance when the effectiveness of these efforts is jeopardized.

There can be little doubt that the decision of the Commission as affirmed by the Eleventh Circuit does constitute a grave threat to State motor carrier enforcement through a road check system. One of the first and most crucial issues confronting a State enforcement officer is whether the interstate carrier he or she has stopped is a private carrier needing no ICC operating rights or a for-hire carrier that must provide proof of its authority through the registration requirements contained in 49 C.F.R. Part 1023.[10] The determination that the State officer must make which is affected by the Commission's decision involves that vehicle that is stopped at a road check which: (a) contains commodities which are subject to ICC regulation; (b) operates in interstate commerce; (c) is owned by an owner-operator or a leasing company and driven by the owner-operator (or his employee) or the employee of the leasing company; (d) is purportedly

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[8] Appendix E at 2e.

[9] *Id.*

[10] Under 49 C.F.R. § 1023.11 an interstate for-hire carrier may not operate in a participating State unless and until its authority has been properly registered. Appendix E at 15e. In addition, the carrier may be required to identify each vehicle operated pursuant to its authority. 49 C.F.R. § 1023.31. *Id.*

exempt from Commission regulation as a private carrier operating under a single-source lease; and (e) is therefore not previously registered with the State under 49 C.F.R. §§ 1023.11 and 1023.31. With this vehicle and this carrier in mind, a comparison of the tests employed by the ICC to draw the line between for-hire and private carriage before and after its February 1982 decision makes clear the enforcement problems created for the States by that decision.

In *H.B. Church Truck Service Co., Common Carrier Application*, 27 M.C.C. 191 (1940) (*Church*), the Commission held that a lease of equipment with driver to shipper creates a presumption of regulated, for-hire carriage by the lessor. Only if the shipper-lessee could prove that it had "the exclusive right and privilege of directing and controlling the transportation service" could the presumption of for-hire carriage be rebutted. 27 M.C.C. at 195-196. In *Oklahoma Furniture Manufacturing Co.—Investigation of Operations*, 79 M.C.C. 403 (1959) (*Oklahoma Furniture*), the Commission provided further guidance for the enforcement of the distinction between regulated and private carriage. The ICC, in interpreting the *Church* control test, held that an owner-operator driving his own vehicle has the power to defeat "any supposed right to control that the shipper-lessee may believe exists." 79 M.C.C. at 411. This decision necessarily strengthened the presumption in favor of regulated carriage in cases in which the driver of the leased vehicle was also its owner. In *United States v. Drum*, 368 U.S. 370 (1962) (*Drum*), this Court affirmed the Commission's decision in *Oklahoma Furniture*, holding that the lease arrangement under review therein did not constitute private carriage because "the Company—[the shipper-lessee] was able to spare itself—and pass to the owner-operators—certain characteristic burdens of the transportation business." 368 U.S. at 379.[11]

[11] The "burdens" of transportation which the Court found crucial in *Drum* included the owner-operators' capital investment in equip-

Returning to the example described *supra* at 8-9, the "control and substance" test distilled from *Church* and *Drum* provides the State enforcement officer with a readily applicable and intelligible rule of law to determine whether the driver's claim to be exempt from regulation is bona fide, or whether the vehicle is in fact engaged in unlawful for-hire transportation of regulated commodities in interstate commerce without ICC authority. Under the *Church* and *Drum* analysis, the lessor is presumed to be engaged in unauthorized for-hire carriage unless the enforcement officer is satisfied that the lessor has satisfactorily rebutted the presumption by providing evidence that the shipper-lessee exercises sufficient control of the transportation service and has assumed the burdens of the transportation business. *United States v. Casale Car Leasing, Inc.*, 385 F.2d 707, 711 (2nd Cir. 1967). Absent the production of some evidence of "control and substance",[12] the fact that the vehicle is found transporting regulated commodities in interstate commerce without ICC authority creates the presumption of for-hire carriage which establishes probable cause for the officer to take enforcement action in a road check situation.

In place of the "control test" announced in *Church* coupled with the "substance test" announced in *Drum*, the Commission's February 1982 decision would reverse the presumption of for-hire carriage as long as six "minimum criteria for the performance of private carriage by a shipper" were met. Appendix B at 57b.[13] The most

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ment, risk of premature depreciation or loss, unforeseen increases in operating and maintenance costs, and the risk of non-utilization of "high-priced equipment." 368 U.S. at 379-380.

[12] Such evidence would include bills of lading, employment status of the driver, copies of written lease agreements, and markings on the vehicle.

[13] These six criteria, in essence, establish the minimum terms of a single-source lease which the ICC indicates will satisfy its new definition of private carriage: (1) the lease must be for 30 days or

significant change in the legal tests for distinguishing for-hire from regulated carriage, of course, is the ICC's decision to eliminate the presumption of for-hire carriage. See also Appendix B at 26b. The elimination of this presumption will fundamentally affect State enforcement procedures. Returning to the example *supra*, under the Commission's decision, the State officer will no longer be able to base a finding of probable cause solely on the unrebutted fact that the vehicle in question is transporting regulated commodities in interstate commerce without an ICC certificate or permit. Simply stated, he or she can no longer presume that such carriage is unlawful for-hire carriage. Rather, the officer must determine if the single-source lessor has satisfied the six "minimum criteria", drawing no inference from the carrier's heretofore apparent for-hire status.

Although the six minimum criteria upon which the officer must now determine the status of the single-source lessor would appear to establish objective measures for drawing the line between for-hire and private carriage, they are so riddled with exceptions and qualifications as to render them unenforceable.

The most serious and obvious deficiency is the fact that the Commission's decision does not require that single-source leases be in writing. Appendix B at 37b.[14] In effect, the Commission has determined that hard evidence of the six minimum criteria deemed necessary to establish private carriage need not be available to State en-

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more; (2) the equipment subject to the lease must be exclusively committed to the shipper's use; (3) the shipper must agree to except exclusive control and responsibility for the use of the equipment; (4) the shipper must provide liability insurance and equipment identification; (5) the shipper must ensure safety compliance; and (6) the shipper must maintain cargo insurance. See Appendix B at 57b.

[14] The ICC does, however, require written leases between for-hire regulated carriers and owner operators. 49 C.F.R. § 1057.11(a).

forcement officers in a road check situation. Presumably then, the officer confronting the purported private carrier must accept as evidence of the shipper's "control and responsibility" the driver's oral explanation of an oral lease agreement. We submit that standing alone the lack of a written lease requirement in the Commission's decision creates a formula for chaos for State enforcement efforts.[15]

The Commission's decision creates additional enforcement problems for the States beyond the question of a written lease. Although the Commission appears to require that equipment subject to a single-source lease be committed exclusively to the shipper's use for the term of the lease and that the shipper must accept exclusive control over leased equipment (Appendix B at 57b), the ICC would permit subleasing to third parties during the leasing period. Appendix B at 34b-35b. Moreover, the Commission would apparently permit multiple subleases during the period of the principal lease. *Id.* Presumably, such subleases may be oral leases with other shippers which comply with the six minimum criteria.

In light of the ICC's decision, we return once more to the road check situation described *supra*: the State officer confronting the unregistered interstate vehicle transporting regulated commodities without ICC authority now finds that the driver has no written single-source lease; rather, the driver claims to be operating on an oral sublease with a shipper during the period of an oral lease with a second shipper. Under the ICC's decision, this arrangement may be perfectly legitimate private carriage, or it may be a subterfuge to avoid for-hire regulation. Although the true status of this carrier may be

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[15] In its decision, the Commission contends that it has no authority to require a written lease. Appendix B at 38b. Yet, it found the authority to require that leases apply for 30 days or more, or that shipper-lessees meet safety and insurance requirements. Appendix B at 57b.

determinable in a judicial-type proceeding, the State officer must determine on the spot whether this purported private carrier is in fact performing illegal for-hire carriage. We submit that the enforcement problems inherent in this situation are obvious. Without the presumption of for-hire carriage, without a written lease requirement, and without a binding exclusivity requirement, we submit that State enforcement will become no more than guesswork.

As we have shown, the ICC's decision is of exceptional national importance, directly and seriously harming the efforts of at least forty-one States to vindicate Federal and State policies that lawful motor carriage be vigorously enforced on the Nation's highways. In light of the importance of this case, the Eleventh Circuit's decision to affirm the Commission requires review by this Court because that decision directly conflicts with this Court's decision in *United States v. Drum*, *supra*, an issue to which we now turn.

b. The Decision Of The Eleventh Circuit Affirming The Commission's Single-Source Leasing Policy Directly Conflicts With This Court's Decision In *Drum* That Definitions Of For-hire And Private Carriage Must Establish Practical And Enforceable Limitations Upon Private Shippers

In *United States v. Drum*, *supra*, this Court agreed to review the identical question presented herein: whether the ICC properly developed a legal standard for distinguishing regulated for-hire carriage from exempt private carriage. There, in the context of an individual enforcement proceeding, the Court held that in light of the "imprecise definitional language" of the statute (i.e., the MCA), the ICC was obligated to establish workable and practical definitions of for-hire and private carriage to ensure that unregulated private carriage would not encroach upon regulated industry:

> "Accordingly, the statutory definitions, while confirming that a shipper is free to transport his own goods without utilizing a regulated instrumentality, at the same time deny him the use of 'for compensation' or 'for hire' transportation purchased from a person not licensed by the Interstate Commerce Commission. Because the definitions must, if they are to serve this purpose, impose practical limitations upon unregulated competition in a regulated industry, they are to be interpreted in a manner which transcends the merely formal."
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> * * * *
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> "The problem is one of determining—by reference to the clear but broad remedial purpose of a regulatory statute committed to agency administration—the applicability to a narrow fact situation of imprecise definitional language which delineates the coverage of the measure."

368 U.S. 375-376.

Clearly, by this language, this Court intended that the ICC devise and implement definitions of for-hire and private carriage which are practically discernible ("which transcend the merely formal") in order that the imprecise statutory definitions could be molded into an effective mechanism for enforcing the licensing requirements of the MCA against shippers seeking to avoid the reach of the regulatory statute.

As we have shown, *supra*, the ICC's February 1982 decision, despite its extended discussion of "changed circumstances", new Congressional policy and the like, contains no workable mechanism which would enable State enforcement personnel to practically distinguish for-hire and private carriage on a daily basis.[16] We respectfully

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[16] Indeed, in order to establish a consistent enforcement policy aimed at preventing the subterfuge of for-hire regulation, a State would be well-advised to issue citations to the driver of every single-source vehicle its officers can observe. Ultimate resolution of the

submit that the Eleventh Circuit's affirmance of the Commission's failure to abide by the instructions of this Court in *Drum* is error, requiring review by this Court.

The Eleventh Circuit devoted little attention to the enforcement issue in its affirmance. Appendix A at 33a. Basically, the Court concluded that the enforceability of the Commission's single-source leasing policy was best left for another day "in the context of individual enforcement proceedings." *Id.* In avoiding this issue, the Court agreed with the Commission's argument that "changed circumstances" justified its new leasing policy, but admonished the ICC to respond accordingly to evidence that subterfuge of for-hire carriage requirements "continue as a threat to a stable and efficient regulated industry. . . ." *Id.*, at n.23.

In reaching these conclusions, the Eleventh Circuit's misunderstanding of the requirements of *Drum* is apparent. First, the Court's reliance upon so-called "changed circumstances" is misplaced. The statutory definitions of common carrier, contract carrier, and private carrier, and the requirement that regulated carriers obtain certificates or permits have not changed since this Court's decision in *Drum* 17. Despite major reforms to the MCA,[18] Congress has chosen to preserve the basic distinction between for-hire and private carriage, and to require that parties performing for-hire transportation be regulated under the MCA. Although as in *Drum*, the statutory definitions remain imprecise, the ICC's new single-source leasing policy, as we have shown, is so destructive of the operational distinction between regulated and exempt

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carrier's claim of private carriage would then occur in a judicial proceeding better suited to determining compliance with the ICC's new definitions.

[17] See Appendix E.

[18] Most notably, the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980).

carriage necessary for effective enforcement that the Eleventh Circuit's conclusion to affirm requires review.

Second, contrary to the Eleventh Circuit's language, subterfuge is not prosecuted to maintain a "stable and efficient regulated industry." Rather, States seek to prescribe unlawful for-hire carriage because it is illegal pursuant to the requirement of 49 U.S.C. § 10921 (Appendix E at 83) that all for-hire carriers be licensed by the ICC. Clearly, a State does not prosecute an individual carrier because his unauthorized for-hire carriage poses a threat to regulated industry. Indeed, it would be virtually impossible for any party to prove, for example, that the unlawful operations of a single owner-operator occasioned such a broad threat. Yet, the Eleventh Circuit apparently directs the Commission (and presumably the States) to take action against subterfuge only when violation of the MCA reaches epidemic proportions. Appendix A at 33a, n.23. In issuing this directive, the Eleventh Circuit again misapprehends the requirement of *Drum* that the definitions of the MCA impose *practical limitations* on unregulated private carriage.

Finally, despite its concern that the ICC's policy may destroy an enforceable line between for-hire and private carriage, the Eleventh Circuit concludes that the Commission's policy "if applied in a reasonable manner" should be upheld. Appendix A at 33a-34a, n.24. We respectfully submit that the Commission's policy, based as it is upon six "minimum criteria" with their attendant loopholes and exceptions (Appendix B at 57b), is incapable of application "in a reasonable manner" in the context of State enforcement activities. As we have shown, the crucial determination which must be made by a State officer confronting a single-source leasing situation (i.e., whether the carrier is a private or illegal for-hire carrier) will be mere guesswork. It is difficult to conceive of a more arbitrary enforcement policy, but the States may well be forced to cite each privately leased driver

they observe in order to apprehend that percentage of carriers which will abuse the ICC's new leasing policy. Clearly, this Court should review this policy to avoid such a result.

For these reasons, we submit that the Eleventh Circuit's decision conflicts with this Court's holding in *Drum* that the definitions of the MCA "be interpreted in a manner which transcends the merely formal." 368 U.S. at 375. The Commission's policy, ill-suited as it is to effective, practical enforcement of the laws of the United States and the States, is precisely the sort of formalism that *Drum* would proscribe.

CONCLUSION

For all of the reasons set forth herein, Petitioner prays that a writ of certiorari be issued to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

WILLIAM PAUL RODGERS, JR.
General Counsel

CHARLES D. GRAY
Assistant General Counsel

GENEVIEVE MORELLI
Deputy Assistant General Counsel

National Association of Regulatory
Utility Commissioners
1102 ICC Building
Post Office Box 684
Washington, D.C. 20044
(202) 628-7324

Dated: January 9, 1984

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Nos. 82-5247, 82-8133

RYDER TRUCK LINES, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION
Respondents.

BOWMAN TRANSPORTATION, INC., *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, and THE
INTERSTATE COMMERCE COMMISSION,
Respondents.

Oct. 11, 1983

Petitions for Review of Orders of the
Interstate Commerce Commission

Before KRAVITCH, HENDERSON and ANDERSON, Circuit Judges.

R. LANIER ANDERSON, Circuit Judge:

Petitioners[1] request that we set aside a policy statement issued by the Interstate Commerce Commission (ICC or Commission) in a proceeding formally entitled Ex Parte No. MC-122 (Sub-No. 2), *Lease of Equipment and Drivers to Private Carriers* (February 9, 1982). In essence, the ICC has announced a new formula for determining whether a particular transportation leasing arrangement constitutes "for-hire carriage," subject to ICC regulation, or "private carriage" exempt from such regulation. Because we conclude that a rational basis exists for the new formula proposed by the ICC, we deny the petition.

I. The Regulation of "For-Hire" Carriage.

The Motor Carrier Act of 1935, 49 Stat. 543-67, 49 U.S.C.A. § 10101, *et seq.* (West 1982 Pamphlet), subjects the provision of for-hire motor transportation to regulation by the ICC. The aim of the act generally is "to assure that shippers . . . will be provided a healthy system of motor carriage to which they may resort to get their goods to market." *United States v. Drum*, 368 U.S. 370, 374, 82 S.Ct. 408, 410, 7 L.Ed.2d 360 (1962); *see* S.Doc. No. 152, 73rd Cong., 2d Sess. (1934); H.R. Doc. No. 89, 74th Cong., 1st Sess. (1935); H.R.Rep. No. 1645, 74th Cong., 1st Sess. (1935). In order to achieve this goal of a stable transportation industry, the Act provides for collective rate-making and erects stringent

[1] Petitioners in these consolidated actions include Ryder Truck Lines, Inc., American Trucking Associations, Inc., Common Carrier Conference-Irregular Route, Regular Common Carrier Conference, National Tank Truck Carriers, Inc., Specialized Carriers and Rigging Association, National Automobile Transporters Association, Bowman Transportation, Inc., and the Steel Carriers Tariff Association, Inc. The following parties are intervenors in this action: the National Association of Regulatory Utility Commissioners, the American Movers Conference, and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America. All petitioners and intervenors hereinafter will be referred to collectively as "petitioners."

barriers to entry into the transportation industry to ensure the need for, and reliability of, those carriers authorized to engage in for-hire transportation. The Act also recognizes the need to allow a merchant to continue to transport *its own goods* "in furtherance of its non-transportation business." *Mercury Motor Express, Inc. v. United States*, 648 F.2d 315, 317 (5th Cir. June 18, 1981);[2] *see* S.Rep. No. 482, 74th Cong., 1st Sess. (1935); H.R.Rep. No. 1645, *supra*. The Act therefore regulates only "common" or "contract" carriers that engage in transportation for compensation or "for-hire carriage." *See* 49 U.S.C.A. §§ 10102(11) & 10102(12). The Act specifically exempts from regulation private carriage. 49 U.S.C.A. § 10102(13).

The original Motor Carrier Act, however, did not provide a substantive definition of private carriage, but rather defined private carriers as transporters of property who are neither common nor contract carriers. Thus, from the outset the ICC was entrusted with the responsibility of determining when the provision of transportation services constitutes exempt private carriage. Moreover, the ICC was required to define this exemption in a manner consistent with Congress' desire to protect shippers from the diversions of traffic that would result from an overly competitive transportation industry. *See United States v. Drum*, 368 U.S. at 374-76, 82 S.Ct. at 410-11. This policy of protecting the motor carrier industry, requiring stringent barriers to entry into the industry, led the ICC at an early date to scrutinize closely nominally private transportation arrangements. Of particular concern to the ICC was a practice known as "single-source leasing," in which the shipper leases both vehicle and driver from the same source. For example,

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[2] In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc), this court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981. *Id.* at 1209.

when a shipper leases the vehicle and driving services of an owner/operator, the ICC must determine whether that owner/operator is engaging in transportation for compensation (for-hire carriage) or whether the shipper is legitimately engaged in procuring equipment and service necessary to engage in private carriage, incidental to its primary non-transportation business. A single-source arrangement potentially can be used to evade the ICC's regulatory authority.

In *H.B. Church Truck Service Co. Common Carrier Application*, 27 M.C.C. 191 (1940), *overruled*, 132 M.C.C. 758 (1982), the ICC recognized the possibility of subterfuge in single-source leasing and attempted to lay down a test to be used when determining whether such arrangements constitute private carriage. The Commission stated that "[e]ssentially the issue is as to who has the right to control, direct, and dominate the performance of the service." *Id.* at 195. If that right of control remained with the lessor, then the lessor would be engaged in for-hire carriage, and subject to ICC regulation. On the other hand, if the right to control, direct and dominate remained with the lessee (i.e., shipper), then the shipper would be engaged in exempt private carriage. Equally important, however, the Commission announced that a *presumption* of for-hire carriage would arise when the shipper leases both vehicle and driver from a single source, such as an owner/operator or a leasing agency. This presumption would yield "to a showing that the shipper has the exclusive right and privilege of directing and controlling the transportation service, as, for example, if the equipment were operated by the shipper's employee." *Id.* at 196. Finally, the determination necessary to rebut the presumption of for-hire carriage would be made in light of all facts and circumstances, none of which would be conclusive by itself.[3] Thus, the *Church*

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[3] In *Church* the Commission found that the arrangement at issue did constitute for-hire transportation. The particular facts which

case formulated the "control" test for distinguishing private carriage from for-hire carriage, and created a rebuttable presumption of for-hire carriage when the shipper engages in single-source leasing.

In 1958, Congress, seeing the need to reinforce the Commission's efforts at preventing subterfuge and evasion of its authority, amended the Motor Carrier Act to clarify somewhat the definition of private carriage. This amendment provided that in order to constitute exempt private carriage it is necessary that:

> (1) the property is transported by a person engaged in a business other than transportation; and
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> (2) the transportation is within the scope of, and furthers a *primary business* (other than transportation) of the person.

Pub.L. 85-626, 72 Stat. 574 (1958), *codified at* 49 U.S.C.A. § 10524 (West 1982 pamphlet) (emphasis added); *see* H.R.Rep. No. 1922, 85th Cong., 2d Sess. (1958); S.Rep. No. 1647, 85th Cong., 2d Sess. (1958).[4]

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led the Commission to hold that the shipper had not exercised sufficient control over the lessor were: (1) the lessor was responsible for maintenance of the vehicle; (2) the lessor paid operating expenses, drivers' salaries, taxes and unemployment compensation; and (3) the lessor provided liability and collision insurance. *See* 27 M.C.C. at 195-96.

[4] The "primary business" test may be viewed as the overall definition of private carriage, while the "control" test, and later, the "substance" test, see below, are the *means* for determining whether transportation is incidental to a primary business. *See* Farris & Southern, *Federal Regulatory Policy Affecting Private Carrier Trucking*, 49 I.C.C.Prac.J. 503, 512-15 (1982). Congress' adoption of the primary business test was caused by the proliferation of so-called "buy-sell" arrangements under which carriers attempted to avoid ICC regulation by literally purchasing the goods to be transported and then selling them upon reaching their destination. By engaging in such arrangements carriers would literally be shipping their own goods: superficially, this would seem to constitute pri-

Contemporaneously with the 1958 amendments, the Commission itself began to reformulate the control test it had announced in *Church*. Thus, in *Pacific Diesel Rental Co.—Investigation of Operations*, 78 M.C.C. 161 (1958), the Commission held that the control test required an answer to the following question: "Are any persons . . . in substance engaged in the business of interstate or foreign transportation . . . for hire?" *Id.* at 172 (using both new formulation and older "control" test). The reformulation signaled a more searching inquiry that was to focus not only on the physical aspects of control and direction, but also on the financial arrangements existing between the lessor and the shipper.[5] This refinement reached its culmination in *Oklahoma Furniture Manufacturing Co.—Investigation, Operations*, 79 M.C.C. 403, 409-10 (1959), *overruled*, 132 M.C.C. 758 (1982), in which the Commission announced that the control test was a separate inquiry from that required in *Pacific Diesel*, and that *Pacific Diesel* in essence created a supplementary test of "substance." Under the Com-

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vate carriage. Both the Commission and Congress, however, saw the arrangement quite differently. *See Brooks Transp. Co. v. United States*, 93 F.Supp. 517 (E.D. Va. 1950), *aff'd*, 340 U.S. 925, 71 S.Ct. 501, 95 L.Ed. 668 (1951) (mem.). Thus, the Senate Report states that the amendment was intended "to correct most of the abuses that have arisen in the name of private carriage and yet would not in any way jeopardize or interfere with the operations of private carriers to provide transportation service—even if the charge is made—as an integral part of a primary business function." S.Rep. No. 1647, *supra*, at 5. *See also Nuclear Diagnostic Laboratories, Inc., Contract Carrier Application*, 131 M.C.C. 578, 581-84 (1979). Perhaps more significant, however, was the Senate's continued concern with the diversion of traffic from regulated carriers to illegitimate private carriers. Such illegitimate carriers could avoid not only ICC rate and licensing requirements, but could also avoid payment of federal excise taxes. S.Rep. No. 1647, *supra*, at 23.

[5] *See generally*, M. Fair & J. Guandolo, *Transportation Regulation* 84 (8th ed. 1979).

mission's new two-pronged test, in order to find that a particular arrangement constitutes private carriage, it would be necessary that no person other than the shipper had "any right to control, direct, and dominate" the transportation service and that no person was "in substance, engaged in the business of . . . transportation of property . . . for hire." 79 M.C.C. at 410. Moreover, the Commission stated that with regard to the first prong, the control test, "there is present, *whenever the owner-operator drives his own equipment*, the right and power of the lessor to defeat any supposed right to control that the shipper lessee may believe exists." *Id.* at 411 (emphasis added). As a result of this two-prong test, the exercise of physical control and domination by the shipper no longer would necessarily suffice to support a finding of private carriage. Rather, under the "substance" prong of the inquiry, the Commission would examine the financial relationship between the lessor and the shipper in an effort to determine whether the lessor was in effect providing a transportation service to the shipper.[6]

This new formulation by the Commission was expressly upheld by the United States Supreme Court in *United States v. Drum*, 368 U.S. 370, 82 S.Ct. 408, 7 L.Ed.2d 360 (1962). During the course of its opinion, the Supreme Court examined Commission case law and stated that the new two-prong test announced by the Commis-

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[6] The financial factors found by the Commission in *Drum*, which proved the existence of for-hire carriage, were as follows: (1) the owner/operators provided exclusive use for a continuous period of time; (2) equipment was furnished, maintained and driven by the owners; (3) all operating costs and trip expenses were borne by the owners; and (4) the owners guaranteed a fixed cost for the transportation and assumed the risk of all losses. 79 M.C.C. at 412. One authority has identified 14 factors that often are considered by the Commission in making its determination. *See generally*, Matthews, *Truck Leasing by Shippers and the Problem of Dangling Instrumentalities*, 32 I.C.C.Prac.J. 370 (1964). For a concise history of the development of the Commission's views as to what constitutes private carriage, see Farris & Southern, *supra* note 3, at 505-16.

sion was in reality "an explicit recognition [of] a premise which has long been implicit in [the Commission's] decisions: That some indicia of private carriage may be assumed, and detailed surveillance of operations undertaken, without a shipper's having significantly shouldered the *burdens of transportation.*" 368 U.S. at 383-84, 82 S.Ct. at 414-15 (emphasis added). The court thus interpreted the Commission's examination of the financial relations between the parties as permissibly treating financial risks as a significant burden of transportation. *Id.* at 385, 82 S.Ct. at 415. To date, the Commission generally has followed the analysis set forth in *United States v. Drum*, and has examined not only the degree of control exercised by the shipper but also the financial obligations, liabilities, and risks allocated to each party. Further, the Commission has continued to rely on the presumptions announced in *Church* and *Drum*. *See, e.g., All Points, Inc.—Investigation of Operations*, 123 M.C.C. 242 (1975); *Snyder's Wholesale Liquors, Inc., Petition*, 113 M.C.C. 528 (1971); *American Equipment Rental, Inc.—Investigation*, 96 M.C.C. 383 (1964). *Compare Ontario Co.—Declaratory Order*, 112 M.C.C. 211 (1970); *Rayette, Inc.—Investigation of Operations*, 108 M.C.C. 410 (1969).

II. The Policy Statement

The instant proceeding commenced on December 24, 1980, when the ICC made public a proposed policy statement, Ex Parte No. MC-122 (Sub-No. 2) *Lease of Equipment and Drivers to Private Carriers*, 132 M.C.C. 351, 45 Fed. Reg. 86766 (Dec. 31, 1980) (Notice of Proposed Policy Statement). The purpose of the proposal was "to consider whether, in light of the exempt nature of private carriage operations, [the Commission] should modify [the] current policy prohibiting persons who do not hold operating authority from this Commission (e.g., owner/operators) from leasing their equipment with drivers di-

rectly to private carriers for the performance of private carriage operations. . . ." 132 M.C.C. at 352. Accordingly, the Commission solicited notice and comment from all interested parties, held a public hearing during the course of the proceeding, and issued its final policy statement on February 9, 1982. *See Lease of Equipment and Drivers to Private Carriers*, 132 M.C.C. 756 (1982), 47 Fed. Reg. 7885 (Feb. 23, 1982).[7]

The substance of this new policy was a reformulation of the criteria to be applied in determining whether a particular leasing arrangement constitutes private or for-hire carriage. Specifically, the Commission declared that no longer would it employ the presumption announced in *Church* that leases of equipment with drivers (single-source leases) ordinarily constitute for-hire transportation by the lessor. Further, the Commission rejected the presumption announced in *Oklahoma Furniture* and upheld in *Drum* that an owner/operator when driving his own equipment has the inherent right and power to defeat the shipper's ability to control, direct and dominate transportation. In addition to eliminating these presumptions, the Commission promulgated a list of factors that it will examine when determining whether exempt private carriage exists.[8] Further, the Commission announced a list of minimum requirements which if included in a *lease* between a shipper and an owner/operator would create a presumption that "the transportation being per-

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[7] The final policy statement was to become effective 30 days after publication in the Federal Register, thus complying with § 4 of the Administrative Procedure Act. *See* 5 U.S.C.A. § 553(d) (West 1977).

[8] According to the Commission:

> [W]e intend to focus on control, responsibility, and the performance of key organizing and management functions of a transportation service as the critical elements of determining who is performing service, and in characterizing the type of carriage being performed.

132 M.C.C. at 777.

formed is private carriage controlled by the shipper." 132 M.C.C. at 778. According to the Commission, such a presumption could be rebutted by a showing that the actual operation of the lease arrangement indicated an absence of the degree of control and responsibility required of the shipper.[9]

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[9] The list of minimum requirements is as follows: (1) the leased equipment must be exclusively committed to the lessee's use for the term of the lease; (2) the lessee must have exclusive dominion and control over the transportation service during the term of the lease; (3) the lessee must maintain liability insurance for any injury caused in the course of performing the transportation service; (4) the lessee must be responsible for compliance with safety regulations; (5) the lessee must bear the risk of damage to cargo; and (6) the term of the lease must be for a minimum period of 30 days. 132 M.C.C. at 778-79. According to the Commission, when the foregoing terms are embodied in a lease, then a presumption of private carriage will arise. Additionally, the Commission enumerated ten other factors which, though not conclusive, are entitled to weight: (1) whether the lease is in writing; (2) whether the lease is for round trips; (3) whether the driver becomes the lessee's employee; (4) whether the equipment is sometimes driven by a person other than the owner/operator or someone selected by him; (5) whether the lease is of tractor only, or of tractor and trailer; (6) who assumes the risk of loss or damage to the equipment, and who pays for fire, theft, and collision insurance thereon; (7) whether the lessee pays or reimburses the driver for such expenses as fuel, oil, tolls, en route repairs, and loading/unloading charges; (8) whether the lessor is required to repair and maintain the equipment; (9) whether the lease provides for some fixed minimum payment, regardless of use; and (10) whether the lessee is assisting the lessor to finance the equipment, and/or whether it holds legal title in trust for the lessor. *Id.* at 780-82. The primary thrust of the Commission's enumeration is to deemphasize certain of the factors referred to in *Drum* as "significant burdens of transportation." 368 U.S. at 385, 82 S.Ct. at 415. In particular, the Commission no longer views as highly significant such factors as whether the shipper has avoided the need for capital investment, whether the lessor assumes the risk of non-utilization of property, whether maintenance is performed at the expense of the lessor, and whether compensation is based on mileage or is at a flat fee. *Compare* 132 M.C.C. at 776, *with Heavy Equipment Rental Co., Investigation*, 98 M.C.C. 365 (1964). According to the Commission, other factors are equally or

The policy statement makes clear, however, that the Commission will not rely upon any precise formula or list of criteria, or:

> restrict [its] inquiry to the formal recitals of the lease agreement, but will—as in the past—examine all surrounding facts and circumstances and the actual conduct of operations under the lease to ascertain if the true substance of the arrangement is in accord with that recited in the formal agreement."

Id. at 776.[10]

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more indicative of private carriage. *See* 132 M.C.C. at 776 ("Our present view of what the term 'characteristic burdens of transportation' encompasses is not the same as that utilized in the Commission's earlier decisions").

[10] The Commission's list of criteria which give rise to a presumption that service is private carriage is comparable to the criteria now used to determine whether an owner/operator may lease his equipment and services to a regulated common carrier. Indeed, the Commission has explicitly stated that henceforth the same test of control shall govern regardless of whether the user is a regulated carrier or a private shipper:

> When a private carrier furnishes service in vehicles owned and operated by others, it must control the service to the same extent as if it owned the vehicles, but need control the vehicles only to the extent necessary to be responsible to the public and the Department of Transportation.

132 M.C.C. at 777 (paraphrasing standard of control used for leases by owner/operators to regulated carriers, *see Lease and Interchange of Vehicles by Motor Carriers*, 52 M.C.C. 675, 681 (1951)), *modified*, 64 M.C.C. 361 (1955), *modified*, 68 M.C.C. 553 (1956); *see* 49 C.F.R. § 1057.-11-.12. During the course of this proceeding, the Commission placed great reliance on the inherent logic of applying the same test of control to private shippers that has always been applied to common carriers leasing from a single source. The logic is not compelling, however. As the Commission points out, the use of different standards of "control," depending upon whether the lessee is a shipper or a regulated carrier, may be explained by the earlier policy of encouraging owners and operators

On March 4, 1982, parties in opposition to the policy statement petitioned the Commission for a stay of its order pending judicial review. This petition was denied on March 18, and a petition for judicial review of the Commission's policy statement was duly filed in this court.

Although the great number of petitioners has resulted in an even greater number of issues, petitioners' essential

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to ally themselves with the regulated industry. By affirmatively discouraging the use of owner/operators by shippers, the ICC could ensure that they would be regulated by virtue of their relationship to a regulated carrier. *See* 132 M.C.C. at 767. Thus, the Commission argues, because Congress is no longer concerned with protecting carriers from diversions of traffic, there is no reason to continue discouraging owner/operators from working for private shippers. This argument has a superficial appeal, but is vulnerable in several respects. First, the Commission's parity argument ignores the reality of the regulations regarding the owner/operator-common carrier relation. Regulated carriers which utilize the services of owner/operators have for some time been subject to "Truth in Leasing" regulations which are aimed primarily at protecting owner/operators. *See* 49 C.F.R. § 1057. The requirements contained in those regulations go much further toward ensuring that common carriers assume control and responsibility for leased owner/operators than anything the Commission has proposed as between shippers and owner/operators. Second, a more relaxed standard of control in the regulated carrier context would be reasonable because there is no possibility for subterfuge; owner/operators hauling goods for others through some kind of arrangement with a regulated carrier will be regulated in any event, either by direct regulation of the owner/operator, or, if controlled by the carrier, by regulation of the carrier. There can be no escape from regulation. It is for precisely this reason, i.e., escaping regulation, that owner/operators may attempt to lease to private carriers. Thus, the potential for subterfuge is present only in the private carriage context. Further, the Commission's "parity" argument does not take into account the significant reasons, other than economic, for encouraging owner/operators to bring themselves under the control of regulated rather than private carriers. *See* Record at 155-71 (documenting safety requirements imposed by common carrier on owner/operators). For these reasons, the Commission's attempt to equate the control requirements in the regulated and private context is not, by itself, persuasive.

contentions are as follows: (1) the Commission improperly proceeded by way of a general statement of policy rather than through rule-making; (2) the proposed changes are beyond the Commission's statutory authority; (3) the change in policy is arbitrary, capricious, or an abuse of discretion; and (4) the Commission failed to abide by the requirements of the National Environmental Policy Act (NEPA), 42 U.S.C.A. § 4321, *et seq.* (West 1977), and the Energy Policy and Conservation Act (EPCA), 42 U.S.C.A. § 6201, *et seq.* (West 1977). Each of these contentions will be discussed in turn.

III. Policy Statement or Rule-Making

Petitioners first argue that because of the far reaching and binding effect which the policy statement will have on future adjudication the Commission acted improperly in proceeding by way of a general statement of policy rather than through a rule-making procedure in accordance with the requirements of § 4 of the Administrative Procedure Act, 5 U.S.C.A. § 553 (West 1977).[11]

Petitioners concede that though this proceeding was labeled a "proposed policy statement," the Commission complied with the notice and comment requirements of § 4. Nonetheless, in order to determine the relevant standard of review, *see* 5 U.S.C.A. § 706(2) (West 1977), we must determine whether the Commission's action was properly denominated a general statement of

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[11] Section 553 requires generally that the agency provide notice of a proposed rule-making in the Federal Register, reference to the legal authority under which the rule is proposed, and a description of the subjects and issues involved. Further, § 553 requires that interested parties have an opportunity to submit relevant data, comments, and arguments. Finally, the agency must publish the rule 30 days prior to its effective date, and incorporate in the rule a "concise general statement" of the rule's basis and purpose. *See* 5 U.S.C.A. § 553 (West 1977). However, § 553 exempts from the "notice and comment" requirements "interpretive rules, *general statements of policy*, or rules of agency organization, procedure, or practice." 5 U.S.C.A. § 553(b)(A) (emphasis added).

policy. Although making this determination is often "akin to wandering lost in the Serbonian bog," *Jean v. Nelson*, 711 F.2d 1455 (11th Cir. 1983), *reh'g granted*, 714 F.2d 96 (1983), "enshrouded in considerable smog," *Noel v. Chapman*, 508 F.2d 1023, 1030 (2d Cir.), *cert. denied*, 423 U.S. 824, 96 S.Ct. 37, 46 L.Ed.2d 40 (1975), the question need not detain us long.

Generally, whether a particular agency proceeding announces a rule or a general policy statement depends upon whether the agency action establishes "a binding norm." *Guardian Federal Savings and Loan Association v. Federal Savings and Loan Insurance Corp.*, 589 F.2d 658, 666 (D.C. Cir. 1978) (quoting *Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33, 38 (1974); see *American Trucking Association v. ICC*, 659 F.2d 452, 463 (5th Cir. Oct. 23, 1981) (Unit A), *cert. denied*, — U.S. —, 103 S.Ct. 1272, 75 L.Ed.2d 493 (1983); *Mercury Motor Express, Inc. v. United States*, 648 F.2d at 319; *Brown Express, Inc. v. United States*, 607 F.2d 695, 701 (5th Cir. 1979); *Regular Common Carrier Conference of the American Trucking Associations, Inc. v. United States*, 628 F.2d 248, 250-51 (D.C. Cir. 1980). The key inquiry, therefore, is the extent to which the challenged policy leaves the agency free to exercise its discretion to follow or not to follow that general policy in an individual case, or on the other hand, whether the policy so fills out the statutory scheme that upon application one need only determine whether a given case is within the rule's criterion. As long as the agency remains free to consider the individual facts in the various cases that arise, then the agency action in question has not established a binding norm. *See American Trucking Associations, Inc. v. ICC*, 659 F.2d at 463; *Regular Common Carrier Conference of the American Trucking Associations, Inc. v. United States*, 628 F.2d at 251 (if agency explicitly says new policy leaves open free exercise of informed discretion, then rights and duties have not actually been

diminished, and binding norm has not been established); *Guardian Federal Savings and Loan Association v. Federal Savings and Loan Insurance Corp.*, 589 F.2d at 667 (agency must remain prepared to defend policy in subsequent proceeding and may not claim matter is foreclosed).

As noted earlier, the Commission has explicitly stated that each case shall be decided by examining the totality of the facts bearing upon the relationship between the lessor and the shipper. Although the Commission has enumerated various criteria which establish a presumption of private carriage, this presumption remains rebuttable. In particular the Commission has stated that it will scrutinize the actual operation of apparently conforming leases to determine whether the terms have been followed. The use of such presumptions generally serves to direct the analysis but not necessarily the answer. Therefore, the use of presumptions does not reasonably transform a statement of policy into a binding norm. *See Regular Common Carrier Conference of the American Trucking Associations, Inc. v. United States*, 628 F.2d at 251 (use of rebuttable presumptions preserves discretion to determine each case on its own factual circumstances). In our view this case is quite similar to *Guardian Federal Savings and Loan Association v. Federal Savings & Loan Insurance Corp., supra.*[12] We con-

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[12] In *Guardian Federal Savings and Loan*, the agency promulgated criteria by which to measure the adequacy of audits required of certain lending institutions. The court held that although the criteria were quite specific, nonetheless they were not determinative of the adequacy of an audit, and the agency remained free to accept nonconforming audits. *See* 589 F.2d at 666-68. Likewise, although a lease between a shipper and lessor may comply with the terms recommended by the Commission's policy statement, if the facts indicate that the actual operation of the arrangement constitutes the provision of transportation services, or if factors above and beyond the provisions contained in the lease indicate same, then the Commission remains free to deny private carrier status.

clude that, to the extent the Commission abides by its disclaimer of having established a binding norm, its characterization of this action as a general statement of policy was correct.

As a general statement of policy, the Commission's action is reviewed by this court only to determine whether it is arbitrary, capricious, an abuse of discretion, or otherwise contrary to law or in excess of the Commission's statutory authority. 5 U.S.C.A. § 706(2)(A)-(D) (West 1977); *see Mercury Motor Express, Inc. v. United States*, 648 F.2d at 319; *Assure Competitive Transportation, Inc. v. United States*, 635 F.2d 1301, 1307 (7th Cir. 1980). Under this standard our task is limited to determining "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Bowman Transportation, Inc. v. Arkansas-Best Freight System*, 419 U.S. 281, 285, 95 S.Ct. 438, 441, 42 L.Ed.2d 447 (1974); *see American Trucking Association, Inc. v. United States*, 642 F.2d 916, 920 (5th Cir. April 17, 1981) (court inquires only to see that statement rationally supported, that agency considered relevant factors and avoided clear errors, and that agency articulated rational connection between facts found and conclusions premised on those facts); *National Tour Brokers Association v. ICC*, 671 F.2d 528, 532 (D.C. Cir. 1982) (review under arbitrary and capricious standard confined to whether rational basis may be found in facts of the record); *Consolidated Rail Corp. v. United States*, 619 F.2d 988, 993 (3d Cir. 1980) (same). Thus, as long as the "agency policy is within the agency's delegated power and meets the test of reasonableness, a court may not upset it without usurping the agency's power." 2 K. Davis, *Administrative Law Treatise* § 7.5, at 25 (2d ed. 1979). *See also Baltimore Gas and Electric Co. v. National Resources Defense Council, Inc.*, — U.S. —, —, 103 S.Ct. 2246, 2257, 76 L.Ed.2d 437, 452 (1983). We proceed to a determination of whether the policy statement satisfies these limited requirements.

IV. The Commission's Statutory Authority to Define Private Carriage.

Petitioners' primary contention is that the Commission's attempt to reformulate the test for defining private carriage was beyond its statutory authority. Petitioners advance the following three arguments in support of this contention: (1) the Motor Carrier Act requires adherence to the definition and presumptions announced in *Church* and in *Drum*; (2) adherence to the definition and the presumption formerly relied upon are mandated by the Supreme Court's opinion in *Drum*; and (3) adherence to the definition and its presumptions is required by implicit Congressional approval of the *Drum case*. In our view these contentions must ultimately fail.

First, the parties have brought to our attention no congressional comment on either the definition of private carriage as formulated in *Drum* or the presumptions regarding single-source leasing adopted by the Commission in the *Church* and *Oklahoma Furniture* decisions. The only attempt by Congress to legislate with regard to the substantive definition of private carriage occurred in the 1958 amendments to the Motor Carrier Act. In those amendments, Congress ratified the Commission's decision to adopt the "primary business test" when determining whether a shipper's carriage of goods *in addition to* its own private carriage rendered that shipper or the carrier leased by that shipper a common or contract carrier subject to ICC permit and licensing regulations. *See Nuclear Diagnostic Laboratories, Inc., Contract Carrier Application*, 131 M.C.C. 578, 581-84 (1979). Although congressional explanation of the amendment centered on the continued concern for diversion of traffic from regulated carriers to illegitimate private carriers, *see* S.Rep. No. 1647, *supra*, at 23, neither the House nor the Senate attempted to formulate a comprehensive distinction between private and for-hire carriage. Rather, the amendment was aimed at a specific type of arrangement commonly

used to avoid the label of for-hire carriage. *See supra* note 3.[13] Likewise, although the Motor Carrier Act of 1980 addressed certain limited aspects of the unregulated carriage industry, there is no discussion in either the House or the Senate Report regarding the appropriate distinction between private and for-hire carriage. Thus, there is no merit to the contention that adherence to the *Drum* analysis with its concomitant presumption is mandated by congressional statements in the Motor Carrier Act and its amendments.

Similarly, we are convinced that the *Drum* case itself does not require continued use of the presumptions rejected by the ICC in this proceeding. Rather, throughout its opinion in *Drum* the Supreme Court reiterated the need to accord the Commission some discretion in determining the appropriate scope of for-hire carriage. For example, the Court commented on the evolving "technique" of analysis used by the Commission. In upholding the Commission's formulation of an appropriate definition of private carriage, the Court explicitly stated that the Commission's conclusions "were well within the range of responsibility Congress assigned to the Commission." 368 U.S. at 385, 82 S.Ct. at 415.

It is true that the Court imposed certain constraints upon the Commission's discretion. For example, the

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[13] The following excerpt from House Report 1922 is indicative of the sentiments expressed in support of the amendment:

> This amendment provides that no person shall, in connection with any other business enterprise, transport property by motor vehicle in interstate or foreign commerce unless such transportation is incidental to, and in furtherance of, the primary business enterprise (other than transportation) of such person. There is no intention on the part of this committee in any way to jeopardize or interfere with bona fide private carriage, as recognized in [*Brooks Transp. Co. v. United States*, 340 U.S. 925, 71 S.Ct. 501, 95 L.Ed. 668 (1951), *aff'g* 93 F.Supp. 517 (E.D. Va. 1950)].

H.R.Rep. No. 1922, *supra*, at 18.

Court stated that because the statutory definitions of private and for-hire carriage "must, if they are to serve their purpose, impose practical limitations upon unregulated competition in a regulated industry, they are to be interpreted in a manner which transcends the merely formal." *Id.* at 375, 82 S.Ct. at 410. Moreover, the Court suggested that the Commission's occasional reformulations of the distinction between private and for-hire carriage were permissible largely because each formulation revolved around a central and implicit theme: "a purported private carrier who hires the instrumentalities of transportation from another must—if he is not to utilize a licensed carrier—assume in significant measure the characteristic burdens of the transportation business." *Id.* at 375, 82 S.Ct. at 410.

Indeed, since *Drum* the Commission has frequently restated its test of substance in terms of the "characteristic burdens of transportation." *See Personnel Service, Inc.—Investigation of Operations and Practices*, 110 M.C.C. 695, 704-06 (1969); *Heavy Equipment Rental Co., Investigation*, 98 M.C.C. 365, 394 (1964). Overall, however, the Court's opinion reflects a deference to the Commission's informed judgment as to what types of burdens are characteristic of the provision of for-hire transportation. *See* 368 U.S. at 385, 82 S.Ct. at 415 (Commission's belief that financial risks are a significant burden of transportation is well within range of responsibility assigned to Commission); *id.* at 374, 82 S.Ct. at 410 (formulation of private carriage in *Drum* is recent instance of Commission's developing technique of decision); *id.* at 376, 82 S.Ct. at 411 (Commission's current resolution of problem does not violate coherence of body of administrative and judicial precedents so far developed in this area). Finally, the Court expressly sanctioned an analysis which focuses on the totality of circumstances rather than the dispositive significance of any one factor. *See id.* at 384, 82 S.Ct. at 415 (emphasizing use of totalities

and noting that indicia are "instruments of decision, not touchstones"; "Commission allowably dealt with this novel situation as an integral and unique problem in judgment, rather than simply as an exercise in counting commonplaces").

Although the Commission's new statement of policy abandons the presumptions regarding single-source leasing announced in *Church* and *Oklahoma Furniture*, and affirmed in *Drum*, the Commission has continued to adhere to an approach that requires examination of all circumstances regarding the relationship between the lessor and the shipper. Moreover, this adherence to an intensely factual determination informed by relevant criteria at least facially ensures the interpretation of private carriage "in a manner which transcends the merely formal." *Id.* at 375, 82 S.Ct. at 410. At most the Commission's new policy articulates new criteria for determining when the control of the transportation by the shipper indicates that the shipper has shouldered the burdens of transportation necessary to have assumed control over the lessor. Thus, rejecting the presumption of for-hire carriage arising from single source leasing, and the presumption that the owner/operator possesses the inherent power to defeat the control of the transportation by the shipper, is indicative only of the Commission's new views as to which burdens constitute significant indicia of private transportation. *Compare Personnel Service, Inc.—Investigation of Operations and Practices*, 110 M.C.C. at 709-10. *See also supra* note 8. We therefore conclude that the Supreme Court's opinion in *Drum* does not preclude the Commission's reconsideration of the presumptions announced in *Church* and *Oklahoma Furniture*.

Finally, petitioners assert that the Commission's longstanding interpretation of private carriage, combined with Congress' failure to articulate a differing interpretation, precludes the Commission from formulating a different test at this late date. Thus, petitioners argue

that Congress has implicitly approved the standards described in *Drum*.

Generally, courts place great weight upon long-standing interpretations and policies announced by an agency, and closely scrutinize departure from agency precedent. *See, e.g., NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 94 S.Ct. 1757, 40 L.Ed.2d 134 (1974);[14] *Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade*, 412 U.S. 800, 93 S.Ct. 2367, 37 L.Ed.2d 350 (1973); *American Trucking Associations v. Atchison, Topeka and Santa*

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[14] Although *NLRB v. Bell Aerospace Co.* involved an agency interpretation of its statute rather than a policy statement, the analysis used by the Supreme Court is instructive. In *Bell*, the NLRB had certified a union as the bargaining representative of a group of "managerial employees." In so doing, the NLRB rejected its long-standing interpretation that managerial employees are not protected by the labor laws; instead, the NLRB held that only managerial employees responsible for "the formulation and implementation of labor relations policies" are excluded by the National Labor Relations Act. 416 U.S. at 269-72, 94 S.Ct. at 1759-61. The Supreme Court reversed the NLRB, holding that the Board was bound by its earlier, long-standing interpretation. In support of its holding, the Court relied primarily on Congress' legislative reaction to the NLRB's interpretation at the time of the Taft-Hartley Act. When drafting the Act, Congress inserted specific provisions to make clear that certain types of employees were excluded by the Act. In other instances, however, Congress explicitly found it unnecessary to legislate with regard to certain employees, including managerial employees, because such employees *already were excluded* under the Board's interpretation of the NLRA. *See id.* at 277-84, 94 S.Ct. at 1763-67. Subsequent to passage of the Taft-Hartley Act, the Board continued to adhere to this interpretation for over two decades. Thus, the Court concluded that Congress' express reliance on the Board's interpretation, combined with the Board's long-standing adherence, made that interpretation binding on the Board. *See id.* at 285-89, 94 S.Ct. at 1767-69. *See also Association of American Railroads v. ICC*, 564 F.2d 486, 493 (D.C. Cir. 1977) ("doctrine of reenactment" applies only if Congress was aware of agency interpretation and affirmatively indicated intent not to change interpretation). As indicated earlier, there is no evidence that Congress has made any relevant statements regarding *Drum* sufficient to call into play the doctrine of reenactment.

Fe Railway, 387 U.S. 397, 87 S.Ct. 1608, 18 L.Ed.2d 847 (1967); *Mercury Motor Express, Inc. v. United States*, 648 F.2d 315 (5th Cir. 1981); *Missouri-Kansas-Texas Railroad Co. v. United States*, 632 F.2d 392 (5th Cir. 1980), *cert. denied*, 451 U.S. 1017, 101 S.Ct. 3004, 69 L.Ed.2d 388 (1981). On the other hand, the Supreme Court has stated:

> [T]he Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice. . . . [T]his kind of flexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of a regulatory agency.

American Trucking Associations v. Atchison, Topeka and Santa Fe Railway Co., 387 U.S. at 416, 87 S.Ct. at 1618 (national transportation policy may authorize Commission departure from precedent even when Congress has considered specific proposals to legislate particular change promulgated by Commission immediately prior to Commission's action); *see Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade*, 412 U.S. at 808, 93 S.Ct. at 2375 (agency may flatly repudiate past norms, deciding that changed circumstances no longer require those norms in order to effectuate congressional policy, so long as agency clearly sets forth grounds for such departure); *Missouri-Kansas-Texas Railroad Co. v. United States*, 632 F.2d at 402-03 (Commission changes in guidelines valid when the result of process of weighing the public interest which is entrusted to Commission).

The Commission has seized upon its responsibility to monitor the effect of its policies on the industry, and has argued throughout this proceeding that its policy change is supported by changed circumstances. According to the Commission, these circumstances include passage of the 1980 amendments to the Motor Carrier Act and overall

changes in the transportation industry. The test generally used for determining the validity of agency changes in policy is essentially the same as the test for determining whether agency action is arbitrary, capricious, or an abuse of discretion. Because both determinations depend upon the existence of a rational basis for the agency action, *see Mercury Motor Express, Inc. v. United States*, 648 F.2d at 319; *Assure Competitive Transportation, Inc. v. United States*, 635 F.2d at 1307; *Association of American Railroads v. ICC*, 564 F.2d at 495, we will treat these two determinations as one.

V. Basis for the Policy Change.

The Commission argues that changes in the nature of the trucking industry occurring since passage of the 1935 Act provide adequate support for its change in policy. Specifically, the Commission contends that neither the regulated sector nor the private carriage sector occupies the tenuous position it occupied in 1935.[15]

The Commission apparently infers from the increased stability of both the regulated and unregulated sectors that there is a reduced need for protection of regulated carriers from encroachment by private carriers. The Commission further reasons that reduced barriers to entry into the regulated sector decrease the likelihood of subterfuge which motivated the Commission to adopt at an early date a stringent test for defining private carriage. *See All Points, Inc.—Investigation of Operations*, 123 M.C.C. 242, 250-52 (1975). The Commission concludes that its new policy statement, retaining as it does the basic test of control announced 40 years ago, will

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[15] *See* 132 M.C.C. at 768 (motor carrier industry bears little resemblance to precarious, fragmented, and unstable industry of the mid-30's). According to the Commission, approximately 40% of truck carriage in this country is transported by private carriers, and private carriers outnumber regulated carriers 9 to 1. *Id.* at 769.

have no "major effect on the overall balance between the regulated and private sectors of the industry." 132 M.C.C. at 769.

The Commission further argues that adopting the more lenient approach toward single-source leasing by private shippers will increase both competition and efficiency in the private sector by opening up an additional source "of fleet augmentation." Additionally, the new policy will provide added opportunities to owner/operators at a time in which they are in dire economic straits. The Commission therefore concludes that all of these factors together indicate that circumstances have changed sufficiently in 40 years to allow a corresponding change in the Commission's treatment of single-source leasing by private shippers.

As additional support for its policy change, the Commission relies upon "changes in statutory direction," 132 M.C.C. at 757, resulting from the 1980 amendments to the Motor Carrier Act. *See* Pub.L. 96-296, 94 Stat. 1898 (1980), *codified at* 49 U.S.C.A. § 10101, *et seq.* (West 1982 Pamphlet). In particular, the Commission points to the amendments in the National Transportation Policy, which stress the promotion of "competitive and efficient transportation services," and contends that these amendments demonstrate congressional awareness of basic changes in the motor carrier industry. 49 U.S.C.A. § 10101.[16] The Commission believes that a more lenient

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[16] The 1980 amendments added the following language to the National Transportation Policy:

> [I]t is the policy of the United States Government [to provide for the impartial regulation of the modes of transportation subject to this subtitle, and in regulating those modes—]. . . .
>
> (7) with respect to transportation of property by motor carrier, to promote competitive and efficient transportation services in order to (A) meet the needs of shippers, receivers, and consumers; (B) allow a variety of quality and price options to meet changing market demands and the

approach to single-source leasing by private carriers will provide both private carriers and owner/operators with more options when structuring their respective transportation arrangements. The Commission concludes that its reformulation of the test for private carriage will result in greater utilization of equipment and necessary support for the private carrier industry, thereby fostering the competition desired by Congress.

The Commission also points to various amendments either specifically addressed to exempt carriage or which reasonably suggest a different regulatory treatment of such carriage. For example, prior to the 1980 amendments Commission rules prohibited the hauling of the shipper's goods by a member of the shipper's corporate family, such as a wholly-owned subsidiary, without a certificate: In the Commission's view this did not constitute private carriage. Section 9 of the 1980 Act, however, removed this restriction and permitted such intercorporate hauling, provided the parent corporation owned a 100% interest in the transporting subsidiary. *See* 49 U.S.C.A. § 10524(b). The 1980 Act also expanded various existing exemptions in order to permit more efficient use of unregulated carriage. Thus, § 7 of the Act increased the number and type of exempt commodities in order to decrease the incidence of empty backhauls, and increased the exemption for motor carrier transportation

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diverse requirements of the shipping public; (C) allow the most productive use of equipment and energy resources; (D) enable efficient and well-managed carriers to earn adequate profits, attract capital, and maintain fair wages and working conditions; (E) provide ad maintain service to small communities and small shippers; (F) improve and maintain a sound, safe, and competitive privately-owned motor carrier system; (G) promote greater participation by minorities in the motor carrier system; and (H) promote intermodal transportation.

Pub.L. 96-296, 94 Stat. 793 (1980), *codified at*, 49 U.S.C.A. § 10101(a)(7) (West 1982 Pamphlet).

incidental to air transportation.[17] The Commission contends that these specific provisions all support a more lenient approach to defining private carriage in order to eliminate inefficiency and foster competition in the overall transportation industry.

In the Commission's view, however, the most significant support for its change in policy stems from the reduction in barriers to entry resulting from the amendments. For example, § 5 of the 1980 Act substantially reduces the burden of proof on persons applying for common carrier certification and contract carrier licensing. *See* 49 U.S.C.A. §§ 10922, 10923 (West 1982 Pamphlet).[18] The Commission emphasizes that Congress has turned away from the protectionist attitude embodied in the 1935 Act, which required strict maintenance of the line between private and common carriage in order to prevent diversions of traffic detrimental to both the shippers and the transportation industry. Rather, in announcing a transportation policy which focuses on ease

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[17] *See* 49 U.S.C.A. § 10526 (West 1982 Pamphlet); H.R.Rep. No. 1069, *supra*, at 18, *reprinted in* 1980 U.S. Code Cong. & Ad. News 2283, 2300 (to alleviate backhaul problem unregulated motor carrier should be allowed to transport certain farm supply items back to areas of agricultural production); *id.* at 19, *reprinted in* 1980 U.S. Code Cong. & Ad. News 2301 (discussing purpose of expanding "incidental-to-air" exception).

[18] The House Report states:

> Section 5 reflects the Committee's strong belief that increased competition and potential competition will bring about the most efficient and economical delivery of transportation service to the public.
>
> The new entry section provides for a balanced approach to entry, which, by lessening the burden of proof on applicants and correspondingly increasing the burden on persons opposing the application, will encourage new applicants to file for authority to provide needed service.

H.R.Rep. No. 1069, *supra*, *reprinted in* 1980 U.S. Code Cong. & Ad. News 2283, 2296.

of entry and competition, Congress has implicitly sanctioned more lenient treatment of nominally private carriage. Presumably these reduced standards will permit many more businesses to enter the regulated transportation industry, with the result that existing carriers will be less protected from natural competitive forces and more subject to diversions of traffic. Thus, the Commission concludes:

> [T]he 1980 Act gives evidence that Congress is much less concerned than it formerly was over the possibility of diversion of traffic from existing regulated carriers. New section 10922(b)(2)(B) provides that the Commission shall not find diversion of revenue or traffic from an existing carrier to be in and of itself inconsistent with the public convenience and necessity. It is true, as several commentators point out, that this provision is in the context of admission of new carriers into the regulated industry. It has no direct application to determining the boundary line between private and for-hire carriage. But the avoidance of diversion was never an end of itself. Rather, it was a policy adopted in order to achieve an earlier regulatory objective of maintaining a stable traffic base for a relatively limited number of regulated carriers—an objective which has now been subordinated by Congress in the act in favor of heightened competition. Since fear of diversion of traffic from regulated to private carriers provided much of the motivation for the Commission's former policy, we think that Congress' lessened concern over traffic diversion can and should legitimately be considered in reappraising that policy.
>
> We also think that the 1980 Act, by reducing the barriers to the entry of new carriers into the regulated industry, has also reduced any incentive such carriers might have to devise subterfuges to remain outside the reach of regulation. See *Pacific Diesel*,

supra. Since the fear of subterfuges and evasion was a major part of the Commission's motivation in adopting its presumption of for-hire carriage in *Church*, *supra*, of control defeasance by owner-operators in *Oklahoma*, *supra*, and in scrutinizing owner-operator leases to shippers in subsequent cases, the greatly decreased incentives to evade regulation under the 1980 Act strongly suggest a reappraisal of both presumptions.

132 M.C.C. at 771.

Admittedly, the evidence adduced by the Commission in support of a change in circumstances is not overwhelming. A reading of the statutory language as well as the relevant House and Senate report suggests that when Congress was speaking of greater competition in the transportation industry, it was concerned primarily with competition *within the regulated* transportation industry. *See* S.Rep. No. 641, 96th Cong., 2d Sess. 2-6 (1980).[19]

Moreover, Congress' relaxed concerns for diversions of traffic from existing carriers might be read as limited to the context of determining whether to grant certificates

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[19] According to the Senate Committee, the central feature of the 1980 Act was the reduction of entry barriers into the regulated sector. This goal would be achieved primarily by lessening the "public necessity and convenience" requirement necessary to secure certification, and by creating a presumption that applicants would operate in the public necessity and convenience. Further, the amendment reduced the ICC's power to regulate motor carrier rates. However, the Committee stressed the need for "entry freedom" in order to "produce a competitive environment in which rates will not be excessively high." S.Rep. No. 641, *supra*, at 6. This reference to competitive environment apparently is addressed primarily to the regulated sector. The competitive environment would be achieved by balancing ease of entry with rate flexibility. *Id.* at 11. The House Report mirrors the Senate's concerns and goals. *See* H.R.Rep. No. 1069, *supra*, at 8-17, *reprinted in* 1980 U.S. Code Cong. & Ad. News 2290-99.

of public convenience and necessity. Thus, Congress' directive that the agency no longer consider diversion of traffic as itself inconsistent with public convenience and necessity may simply have been another mechanism for reducing barriers to entry *into the regulated sector. See* S.Rep. No. 641, *supra*, at 24. *See generally* 49 U.S.C.A. § 10922 (procedure and criteria to be used in issuing certificates to common carriers). In fact, greater leniency in determining whether a particular arrangement constitutes private carriage might be viewed as inconsistent with a congressional policy of *encouraging* entry into the regulated sector. *Cf.* S.Rep. No. 641, *supra*, at 116 (100% ownership requirement for intercorporate hauling "preserves the essential role of private carriage, but does so with a minimum of conflict with the common carrier concept").

Finally, it is not clear what inferences may be drawn from Congress' extension of certain specific exemptions in the 1980 Act. For example, although the amendments do allow intercorporate hauling by a wholly-owned subsidiary, Congress rejected proposals that would have allowed such hauling by less than wholly-owned subsidiaries. *See Economic Regulation of the Trucking Industry: Hearings Before the Committee of Commerce, Science, and Transportation on S. 2245*, 96th Cong., 2d Sess. 1463-64 (1980) (§ 8 of the Senate bill would have exempted intercorporate hauling from regulation when the parent corporation owned 51% of transporting subsidiary). Similarly, Congress rejected a proposal aimed specifically at allowing private carriers which transport exempt commodities on a "front haul" to carry nonexempt commodities on the back haul, thereby increasing carrying capacity and eliminating inefficiencies in the private carrier sector. *See id.* at 1461-63. *See also Economic Regulation of the Trucking Industry: Hearings before the Committee on Commerce, Science, and Transportation on S. 2245*, 96th Cong., 2d Sess. 1765-1810 (1980) (testi-

mony regarding back haul exemptions for "true owner/operators"). Further, in support of a provision in the 1980 Act exempting the transportation of processed food, the Senate specifically commented upon the extent to which private carriage had taken much of the business away from the regulated carriers:

> With respect to the motor carrier transportation of [processed, nonexempt food], almost 70 percent is transported today by private carriage. In other words, by their actions shippers in this country have indicated that the regulated motor carrier system is not meeting their needs to a substantial extent.

S.Rep. No. 641, *supra*, at 8. The foregoing language implies a continued concern for the diversion of traffic by private carriers from the regulated carrier industry.[20]

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[20] Various petitioners have asserted that in fact Congress considered and rejected proposals to accomplish what the Commission has here sought to do. Our review of the legislative materials, however, has not disclosed any specific proposals debated and rejected. Moreover, even if Congress had been confronted with such legislative proposals, we would not necessarily conclude that the Commission was precluded from acting on its own. In its report, the Senate stated:

> In addition to the specific provisions of this bill, there are other areas where the Committee did not act, either because it approved current Commission policy or felt that the Commission was the proper forum for the interested parties to address the issues.

S.Rep. No. 641, *supra*, at 4. This statement by Congress substantially weakens any argument that through its inaction Congress has prohibited the changes sought by the Commission in its policy statement. Petitioners argue further, however, that in effect this policy statement is an attempt to institute "master licensing" based on general findings and conclusions rather than individual adjudications. Congress specifically prohibited such an approach with regard to certification. *See* 49 U.S.C.A. § 10922(b). In our view, however, petitioners' contention is without merit. *See American Trucking Ass'n, Inc. v. United States*, 642 F.2d at 920-22.

In the end, however, we are mindful of the Commission's responsibility for reexamining its rules and policies in light of changed circumstances. *See American Trucking Associations v. Atchison, Topeka and Santa Fe Railway Co.*, 387 U.S. at 415-16, 87 S.Ct. at 1618 (Commission's flexibility and adaptability to changing needs and patterns of transportation are essential part of the office of regulatory agency; national transportation policy is yardstick by which correctness of Commission's actions will be measured). Thus, the Commission may reject long-standing policies, interpretations, and guidelines so long as its action is rationally based and consistent with the Commission's statute. *See, e.g., Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade*, 412 U.S. at 808, 93 S.Ct. at 2375; *Mercury Motor Express, Inc. v. United States*, 648 F.2d at 319; *National Tour Brokers Association v. ICC*, 671 F.2d at 531-33. Moreover, in finding that changed circumstances reasonably permit a change in policy an agency is entitled to rely to some extent on the experience and expertise it has acquired during the course of its existence, *see Mercury Motor Express, Inc. v. United States*, 648 F.2d at 319; *National Tour Brokers Association v. ICC*, 671 F.2d 532-33, as long as this reliance on agency experience is documented and made a part of the record so that the courts can determine whether the agency's action is facially rational. *See Mercury Motor Express, Inc. v. United States*, 648 F.2d at 319; *National Tour Brokers Association v. ICC*, 671 F.2d at 533.

As discussed above, the proposed policy change is not inconsistent with the provisions of the Motor Carrier Act. Further, we find no clear error of judgment in the Commission's assertion that competition will be enhanced by the proposed relaxation of standards with respect to single-source leasing by shippers. Even if the amendments to the National Transportation Policy were concerned only with the regulated sector, it would be rational to assume that providing owner/operators alternatives to

employment solely with common and contract carriers would lead to greater competition for their services within that sector. Such competition would in turn foster a healthier transportation industry in both the regulated and unregulated sectors. *See National Tour Brokers Association v. ICC*, 671 F.2d at 533 (Commission may rely on experience as long as it fully explains perceptions supporting action, and makes its experience part of record).[21]

Recently, in *Mercury Motor Express, Inc. v. United States*, *supra*, a panel of the former Fifth Circuit considered a similar policy change. In *Mercury Motor* the Commission had announced that in light of changes in the industry it was abandoning its forty-year-old policy of denying incidental contract authority to private shippers. 648 F.2d at 317.[22] According to the Commission, the "dynamic expansion" of the motor carrier industry no longer supported the protectionist attitude behind the rule, while such factors as the need for energy efficiency clearly required reconsideration. The court thus held that the changed policy was consistent with the Motor Carrier Act and "rational on its face." *Id.* at 320. Here, too, we conclude that the Commission's assertion of changes in the industry, as supported by the National Transportation Policy, provides a rational basis for reconsidering and rejecting the presumptions announced in *Church* and *Oklahoma Furniture*.

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[21] It is important to reflect on the fundamental change rendered by the 1980 amendments to the Motor Carrier Act. From 1935 until the present, Congress has steadfastly adhered to the goal of a stable and efficient transportation system. From 1935 until 1980, the primary means for securing such a system was by protecting a relatively small pool of common and contract carriers. In 1980, however, Congress apparently decided that the goal of a stable and efficient system now could be attained by substantially greater competition.

[22] Under the rule of *Geraci Contract Carrier Application*, 7 M.C.C. 369 (1938), the Commission would generally deny common or con-

Petitioners contend that MC-122 will result in an increase in subterfuge to avoid regulation, and that the new criteria effectively destroy the distinctions between private and for-hire carriage. In our view, however, it is well within the Commission's area of expertise to postulate a decreased danger of subterfuge.[23] Further, the Commission has expressly declared that it intends to maintain the distinction between private and for-hire carriage, *see* 132 M.C.C. at 770, and that it will continue to ferret out for-hire schemes which purport to be private shipping. *Id.* at 772. In our view the better arena for holding the Commission to these promises and ensuring that its determinations are made in "a manner which transcends the merely formal," *United States v. Drum*, 368 U.S. at 375, 82 S.Ct. at 410, will be in the context of individual enforcement proceedings. We conclude that the new policy is a rational response to the Commission's findings of changed circumstances. *See Regular Common Carrier Conference of the American Trucking Associations, Inc. v. United States*, 628 F.2d at 252.[24]

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tract authority to a private shipper unless it could be shown that the incidental authority would in no way impinge upon the interests of existing regulated carriers. This rule was deemed necessary to protect a weak industry.

[23] It should be recalled that the danger of subterfuge was largely the cause for the Commission's heretofore strict reading of private carriage. Of course, should subterfuge continue as a threat to a stable and efficient regulated industry, we expect the Commission to respond accordingly.

[24] In *Regular Common Carrier Conference, supra*, a panel of the United States Court of Appeals for the District of Columbia Circuit approved a similar ICC policy change. The court added a *caveat*, however, which we deem particularly appropriate, and therefore adopt:

> We emphasize that, although we do not set aside the Commission's pronouncement, neither do we place an imprimatur on certain ambiguous—and perhaps legally unsound—comments in it. . . . [O]nly subsequent adjudications will reveal whether, as petitioners fear, the Commission is attempting to evade [a]

VI. Compliance With NEPA and EPCA.

Under the NEPA, agencies are required to consider possible environmental effects of proposed federal actions. Generally, this consideration takes the form of any Environmental Impact Statement (EIS). *See* 42 U.S.C.A. § 4332 (West 1977). Additionally, the EPCA requires

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statutory requirement . . . . If such an attempt is revealed, it will then be proper for a court to act.

628 F.2d at 252. In particular, we have some concern with some of the Commission's language which might be interpreted to place overwhelming significance upon the rather vague concept of "a complete transportation service," 132 M.C.C. at 773, as a prerequisite for finding for-hire carriage. The Commission describes this concept only as involving "key management and organizational functions that characterize a transportation company," including "dispatch, scheduling movements, and general coordination." *Id.* An overemphasis on this concept, and a pro-private carriage bias in the application thereof, could result in a complete blurring of the line between private and for-hire carriage. For example, there would be serious question about a finding of private carriage in the case of a single owner/operator who controlled all of his own activities subject only to a shipper's designation of a pick up time and place and a time and place of destination. Such an owner/operator would seem clearly, under any reasonable standard, to be hauling the goods of another; or conversely, the arrangement would seem clearly *not* to reflect a "shipper or manufacturer which transports its own goods." *Id.* at 787. And yet, we cannot be sure such an owner/operator, who in effect manages and schedules only his own activities, would fall clearly within the "complete transportation service" concept. Our concern is alleviated to a great extent by the fact that the Commission's decision also places significant reliance on whether or not the shipper exercises *control* and *responsibility*, and on the Commission's assurances that the determination will be based upon the totality of the circumstances, that the practical distinction between private and for-hire carriage will be maintained, and that subterfuges will not be tolerated. Moreover, litigants will be free to challenge the Commission's application of the instant policy in individual enforcement proceedings.

We are satisfied that the Commission's policy, if applied in a reasonable manner, is a rational response to changed circumstances, and is within the range of responsibility assigned the Commission by Congress.

the ICC to consider the possible effect of its actions on reducing energy consumption. When necessary, this requirement includes preparing a Statement of Energy Impact (SEI). *See* 42 U.S.C.A. § 6362(b) (West 1977). The obligations to prepare an EIS and an SEI, however, are not mandatory. Rather, the requirements of the NEPA are triggered only for "major federal actions significantly affecting the quality of the human environment," 42 U.S.C.A. § 4332(2)(C), and the EPCA requires an energy statement only where practicable. 42 U.S.C.A. § 6362(b). Thus, with regard to both Statements, the Commission is accorded a large amount of discretion in determining either the necessity for preparing the Statement or the scope of the inquiry it will perform. *See Mercury Motor Express, Inc. v. United States*, 648 F.2d at 319-20 (decision by Commission that action is neither major federal action significantly effecting human environment nor major regulatory action under the EPCA is reversible only if arbitrary, capricious or abuse of discretion); *American Trucking Association, Inc. v. United States*, 642 F.2d at 923 (5th Cir. 1981) (agency may reasonably conclude that impact statement not necessary); *Sierra Club v. Hassell*, 636 F.2d 1095, 1098 (5th Cir. 1981) (Unit B). We conclude that the agency's determination that the proposed action is expected to reduce fuel consumption in the industry was sufficient under the EPCA. Further, the Commission's conclusion that no environmental impacts are expected comports with the Commission's own regulations and general practice. *See* 49 C.F.R. §§ 1105.6, 1106.5.

CONCLUSION

On the basis of the foregoing, the petitions for review of MC-122 are DENIED.

APPENDIX B

EC

INTERSTATE COMMERCE COMMISSION

EX PARTE No. MC-122 (Sub-No. 2)

LEASE OF EQUIPMENT AND DRIVERS TO PRIVATE CARRIERS

AGENCY: Interstate Commerce Commission

ACTION: Policy Statement

SUMMARY: By this notice, the Commission modifies and makes final its proposed policy statement in *Lease of Equipment and Drivers to Private Carriers*, 132 M.C.C. 351 (1980), 45 Fed. Reg. 86766 (December 31, 1980), concerning the distinction between private and for-hire carriage where a private carrier conducts its operations with equipment and drivers leased from unregulated lessors, including owner-operators. Discussed is the practical and legal distinction, and the factors that the Commission will now consider in determining whether such operations by private carriers fall outside the scope of the Commission's jurisdiction, 49 U.S.C. § 10524(a), or instead constitute for-hire transportation by the lessor of the equipment with drivers, for which a certificate or permit is required.

EFFECTIVE DATE:

This policy is effective 30 days from the date of publication of this notice in the Federal Register.

FOR FURTHER INFORMATION CONTACT:

Robert G. Rothstein
(202) 275-7912

or

Edward E. Guthrie
(202) 275-7691

SUPPLEMENTARY INFORMATION:

This proceeding was instituted on December 31, 1980, by the publication of a notice in the Federal Register [1] stating our intention to reexamine the Commission's tests used to distinguish private from for-hire carriage. The tests operate generally to preclude owner-operators and others not holding authority from the Commission from leasing their equipment with drivers directly to private carriers. We recognize the continued need to maintain a workable distinction between for-hire and private carriage. We propose (a) to focus primarily on the control exercised over a lessor, and (b) to repudiate the presumption that construed lessors to be carriers for hire where their lessees are private carriers.

Comments—Generally

The Commission received approximately 155 comments, representing over 200 persons.[2] Commentors may be placed in four general groups. There were approximately 40 comments from individuals, the vast majority of whom identified themselves as owner-operators. With four exceptions, all owner-operators endorsed our proposal. Comments were received from 30 manufacturers and shippers, many of which operate private fleets. All shippers and manufacturers agreed with the basic principle of allowing

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[1] 45 Fed. Reg. 86766 (December 31, 1980), *Lease of Equipment and Drivers to Private Carriers*, 132 M.C.C. 351 (1980).

[2] See Appendix A.

owner-operators to lease directly to shippers/private carriers, although many commentors in this group proposed modifications. Over 30 associations and trade groups responded. Generally, associations representing owner-operator and shipper interests were in favor of the proposal, while associations and trade groups representing the regulated motor carrier industry opposed it. Lastly, over 120 regulated motor carriers voiced their opposition to the proposal.

In addition to written comments, the Commission on October 14, 1981, conducted an oral hearing in Washington for the purpose of eliciting additional views and supplementing the record.[3] Twenty-seven parties, representing over 45 interests, appeared and presented evidence which substantially echoed their respective or representative comments filed earlier.

Conclusions

In light of recent changes in statutory direction, and the Commission's changes in regulatory policy over the past few years, we believe it is reasonable to reassess the Commission's approach to defining the line between private and for-hire carriage. We think we can prospectively draw the line somewhat differently than we have in the past when considering whether a particular lease arrangement constitutes private vis-a-vis for-hire carriage, based on the consideration of factors not previously identified in Commission decisions.

We shall continue to look at all the circumstances surrounding a lease arrangement to determine whether the lessor holds out only the use of the instrumentalities of transportation, *i.e.*, truck and driver, or whether it instead holds out what is in substance a complete transportation service for compensation. The former would be

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[3] See *Notice Of Oral Argument On Proposed Policy Statement*, served September 29, 1981, 46 Fed. Reg. 48344.

exempt, while the latter would be subject to regulation. In making individual determinations, we will focus on the elements of control, responsibility, and performance of the key organizing and management functions of a transportation company as the critical elements in evaluating the character of the service provided. We will, however, no longer employ the rebuttable presumption announced in the *Church* case, *infra*, that leases of equipment with drivers to shippers ordinarily give rise to for-hire transportation by the lessor. Neither will we use the virtually irrebuttable presumption contained in the *Oklahoma Furniture* decision *infra*, that an owner-operator driving his own equipment has the right and power to defeat the lessee's control. We will abandon the suggestion contained in earlier cases that legitimate private carriage results only when an owner-operator becomes an employee of the private carrier. We also believe that there is no longer any justification for maintaining different standards for judging lease arrangements with drivers, depending on whether the lessee is a private or for-hire carrier.

We are confident that our new approach is in accord with existing statutory requirements. Nevertheless, we intend to monitor the practical effects of the policy change we are adopting on the regulated sector, private carriers, owner-operators, and the shipping public on a continuing basis. If actual operations under the new policy disclose effects that are clearly contrary to the public interest or the National Transportation Policy, we are prepared to make adjustments or changes in our policy.

Preliminary Matters

Various commentors raise three objections directed more to the Commission's procedures than to the merits of our proposal. Commentors claim, first, that Congress has recently considered and rejected a similar proposal, and that we may not now proceed to overturn that legislative determination; second, that a policy statement is an inap-

propriate vehicle for our proposed changes; and, third, that we have evidenced a prejudgment of the issues presented. We find no merit in any of these claims.

1. *Legislative History.* Nothing in the legislative history prevents the action we are proposing. The commentors have not pointed out to us, and our research has not revealed, any measure similar to our proposal here which was explicitly examined by either the Senate or the House during their deliberations on the Motor Carrier Act of 1980.[4] Congress plainly left a number of regulatory problems unaddressed in the Act. The fact that Congress could have legislated further, or that Congress directly addressed certain concerns, cannot be considered as an explicit determination to preclude the exercise of our statutory authority to reexamine policy areas not specifically addressed by Congress, provided our ultimate determination is consistent with the law and is a reasonable exercise of our discretionary authority.

2. *Use of a Policy Statement.* Several commentors object to the use of a policy statement rather than a substantive rule as a vehicle for setting forth new guidelines regarding the distinction between private and for-hire carriage. Ryder Truck Lines, for example, contends that our policy statement will have a substantial impact on motor carrier operations and, therefore, should be conducted within the ordinary rulemaking provisions of the Administrative Procedure Act (APA).

The procedural objections of the various commentors are without merit since we have in fact given full notice of our proposal, have received comments, and, following

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[4] Schneider Transport *et al.*, assert that Congress rejected proposals to grant owner-operators backhaul authority for all commodities and authority to lease to shippers. (See their comments at page 3.) They point to no express rejection, however. The overall tone of their presentation suggests that any such rejection is to be implied from the fact that the area of private carriage was generally considered during development of the Motor Carrier Act.

examination of the comments, are announcing the new guidelines on 30 days' notice, all as required by section 553 of the APA. In other words, we have fully complied with all applicable requirements for notice-and-comment rulemaking. See *American Bus Ass'n* v. *United States*, 627 F.2d 525 (D.C. Cir. 1980).

However, we believe that something less rigid than a formal rule is more suitable to our purposes here. An interpretative rule is a statement issued by an agency to advise the public of the agency's construction of the statute it administers, or what the court described in *Guardian Federal Savings and Loan Ass'n.* v. *FSLIC*, 589 F.2d 658, 664 (D.C. Cir. 1978), as a clarification or explanation of an existing statute. A policy statement is a statement issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power. See generally, *Attorney General's Manual on the Administrative Procedure Act* (1947) at page 30. Our proposal falls within both of these definitions.

Our purpose in issuing this policy statement is to announce to the public what factors we will consider as sufficient to establish private carriage with leased equipment and drivers, so that affected parties may conform their future conduct to the statute as interpreted by the Commission and thus avoid Commission enforcement action. Whether any particular arrangement constitutes private or for-hire carriage will continue to be decided on a case-by-case basis in light of the facts disclosed in that case. Use of an interpretive or policy statement thus seems to be quite permissible. See *Regular Common Carrier Conference* v. *United States*, 628 F.2d 248 (D.C. Cir. 1980).

3. *Purported Prejudice.* The Regular Common Carrier Conference of the American Trucking Associations (RCCC) asserts that we have prejudged the issues pre-

sented in favor of the proposal, and have unfairly placed upon commentors the burden of dissuasion. The Conference points to a number of statements in our notice which it believes demonstrates our asserted predetermination.

The RCCC seriously misconceives the nature of the notice-and-comment process. Our preliminary review of the subject area satisfied us that some review of the traditional tests for distinguishing between private and for-hire carriage was warranted in light of statutory changes and the enormous growth of private and for-hire carriage. The major necessity, we concluded, was to reassess what the statute required and review what types of distinctions need to be maintained between private and for-hire carriage. We also had doubts about the continued validity of the legal presumptions which have been employed through the years and have had the effect of precluding shippers from engaging the services of owner-operators in factual circumstances where we now believe that legitimate private carrier operations can be conducted. We sought comments on our analysis and the effect of possible changes on the concerned parties. As will be seen, our overall assessment, including our legal analysis, has changed somewhat in light of the comments submitted.

History of the Commission's Approach to the Leasing Issue

1. *Leasing To Shippers.* The issue with which this proceeding is concerned has been before the Commission ever since the passage of the Motor Carrier Act of 1935. By that Act, Congress undertook to regulate interstate motor carriage for hire (with certain exceptions not here relevant),[5] but excluded from its coverage the carriage by shippers of their own goods;[6] it also did not bring

[5] The precise limits of the Commission's jurisdiction over motor carriage are codified at 49 U.S.C. 10521(a).

[6] The exclusion of private carriage is codified at 49 U.S.C. 10524(a). This provision stems not from the 1935 Act itself, but

under regulation those persons who merely lease or provide to others the instrumentalities of transportation, *e.g.*, truck and drivers.[7] The problem arose by drawing the line, among a nearly infinite variety of business arrangements, between those activities which must be licensed by the Commission and those that are exempt from licensing. As summarized in *United States* v. *Drum*, 368 U.S. 370, 374 (1962):

> The Commission, therefore, has had to decide whether a particular arrangement gives rise to that "for-hire" carriage which is subject to economic regulation in the public interest, or whether it is, in fact, private carriage as to which Congress determined that the shipper's interest in carrying his own goods should prevail.

The leading decision by the Commission is *H.B. Church Truck Service Co. Com. Car. Application*, 27 M.C.C. 191 (1940), involving an applicant for authority which, as a sideline, leased trucks with drivers to a few shippers.[8] The Commission found that the leasing service was not held out to the general public; that the leased trucks were painted to suit the particular shippers, and served no one

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from a 1958 amendment which was intended to write into the statute the "primary business" test applied by the Commission in the *Lenoir Chair* case. See *Brooks Transp. Co.* v. *United States*, 93 F. Supp. 517 (E.D. Va. 1950), *aff'd*, 340 U.S. 940 (1951); Interstate Commerce Commission, *Seventy-First Annual Report* (1957), p. 137; *Seventy-Second Annual Report* (1958), pp. 132-133. See also the definition of "motor private carrier" codified at 49 U.S.C. 10102(14).

[7] *Rittenhouse-Investigation of Certificate*, 78 M.C.C. 389 (1958); *Personnel Service Inc., et al.—Investigation*, 110 M.C.C. 695 (1969).

[8] Since the applicant was plainly a common carrier for most purposes, it was frequently referred to as "the carrier", even in that portion of the opinion where the question at issue was whether the applicant in its leased-truck activities was acting as a lessor or as a carrier for hire.

else; and that the applicant provided the truck and driver, maintained the vehicle, and paid all operating expenses including property, public liability, and collision insurance. In the course of holding that this operation represented contract carriage, the Commission said (27 M.C.C. at 195-96):

> With reference to the leased-truck operations, the first question presented is whether the operation is that of applicant, as the performance of transportation for hire, or whether it is private carriage, performed by the shipper. The line of distinction between the two is not always clear. Essentially the issue is as to who has the right to control, direct, and dominate the performance of the service. If that right remains in the [lessor] carrier, the carriage is carriage for hire and subject to regulation. If it rests in the shipper, it is private carriage and not subject to regulation * * *. *The question as to who has the right to control and direct must be answered in the light of all the facts and circumstances surrounding the transaction between the carrier and shipper, and of the actual practices in the conduct of the operation thereunder.* No one element of such facts and circumstances is by itself conclusive.
>
> Clearly, so-called leases of equipment by a carrier to a shipper may differ materially in their results from a regulatory standpoint from leases by one carrier to another. The former are sometimes subterfuges and devices to evade regulation, particularly as to operating authority and rates. The public interest requires that we use diligence to prevent evasions of regulation through such devices. Consequently, in cases in which the question of the status created by a lease of equipment with drivers by a carrier to a shipper is presented, in the absence of a showing to the contrary, the presumption arises that the transportation is performed by the carrier for compensa-

> tion, in other words is for-hire transportation and as such is subject to regulation. This presumption will, of course, yield to a showing that the shipper has the exclusive right and privilege of directing and controlling the transportation service, as, for example, if the equipment were operated by the shipper's employee. (Emphasis added)

The *Church* decision stated that the presumption of for-hire transportation would yield to a showing that the shipper-lessee had "the exclusive right and privilege of controlling the transportation service". The Commission continued, however, to take into account "all the facts and circumstances surrounding the transaction" (as provided in *Church*), including facts and circumstances having no obvious bearing on the issue of exclusive control (*e.g.*, the form of compensation received by the lessor). In time, this concern for facts and circumstances not directly related to control came to be articulated as a secondary test of "substance", *i.e.*, "are any persons here [before the Commission], in substance, engaged in the business of interstate or foreign transportation . . . for hire?" *Pacific Diesel Rental Co.—Investigation of Operations*, 78 M.C.C. 161, 172 (1958).[9] As late as *Pacific Diesel* it was stated that "control" and "substance" were really a single test, although articulated in two alternative forms; but the following year, in *Oklahoma Furniture Mfg. Co.—Investigation of Operations*, 79 M.C.C. 403, 409-10 (1959), these were stated as two separate questions to be answered.

The Commission had indicated in *Church* that a shipper could rebut the presumption of for-hire carriage and establish the existence of *bona fide* private carriage by placing the driver of the leased equipment on its payroll as an employee. Where the driver of the leased equip-

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[9] The quoted language is paraphrased from *Georgia Truck System* v. *I.C.C.*, 123 F.2d 210, 212 (5th Cir. 1941).

ment was also its owner, however, it held in *Pacific Diesel* that the continuing relationship of the owner-drivers to the lessor (a leasing company) negated the inference of exclusive control in the lessee-shippers based on the terms of the written lease arrangements between them and the lessor and the fact that each shipper placed the driver or drivers on its payroll for the duration of its lease.[10]

The following year, in *Oklahoma Furniture*, *supra*, the Commission came to the same conclusion even though in this case there was no intermediary and no indication of control by anyone but the shipper; the leases from the owner-operators to the shipper were long-term; and the Commission assumed, *arguendo*, that the status of the owner-operators as employees of the shipper was *bona fide*. Notwithstanding these significant differences from *Pacific Diesel*, the Commission found (79 M.C.C. at 411):

> There is present, whenever the owner-operator drives his own equipment, the right and power of the lessor to defeat any supposed right of control that the shipper-lessee may believe exists. We are satisfied that the company does not have the exclusive right and privilege of controlling the transportation service considered.

As to the "substance" test, the Commission concluded that the arrangements between the shipper and the owner-operators constituted contract carriage. It pointed to the

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[10] *Pacific Diesel Rental Co., supra.* The owner-drivers leased their rigs to Pacific Diesel, which then subleased the equipment to a number of shippers. Although the latter lease agreements ostensibly allowed the shippers to furnish their own drivers, in fact the vehicles were invariably driven by their owners. The evidence indicated that the drivers typically reported en route to Pacific Diesel rather than to the shippers, and that the shippers traced the vehicles through Pacific Diesel; and there was other evidence of control by Pacific Diesel over en-route operations. The Commission found the overall pattern to be more akin to typical common carriage on the part of Pacific Diesel than to private or even contract carriage.

various transportation risks borne by the owner-operators rather than the shipper, and held that none of the departures from the usual conditions of contract carriage shown by the evidence were sufficient to distinguish the arrangement at issue from such carriage.

Commissioner Webb, in his dissenting statement (79 M.C.C. 416, at 417), said of the result:

> No one can fail to grasp the significance of this sweeping pronouncement. It means, plainly and simply, that . . . the mere status of owner-operator-lessor is said automatically to defeat lessee control irrespective of the existence of convincing facts to the contrary.[11]

The Supreme Court in *Drum*, *supra*, affirmed the Commission, but its opinion did not preclude the Commission from now eliminating the presumption that the leasing of both equipment and driver services from the same source constitutes for-hire transportation.

The Court began its analysis by noting that the statute evinces a purpose to "impose practical limitations upon unregulated competition in a regulated industry". 368 U.S. at 375. By this we think it clear that the Court meant that the Commission must devise practical and meaningful distinctions between for-hire and private carriage so that persons may not simply engage in unregulated competition with the regulated industry under the guise or label of private carriage.

The Court then went on to say (368 U.S. at 375; emphasis supplied):

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[11] The dissent further cited fifteen indicia of true private carriage in the facts of record, and concluded that "it is highly unlikely that there is any carrier in the United States whose connection with the prime attributes of transportation service is as tenuous as that of the respondents [owner-operators]."

> From the outset the Commission has correctly interpreted [the statutory definitions] as importing that a purported private carrier who hires the instrumentalities of transportation from another must—if he is not to utilize a licensed carrier—*assume in significant measure the characteristic burdens of the transportation business.*[12]

This indicates the Court's judgment of the basic test that the statute requires—*i.e.*, assumption of "the characteristic burdens of the transportation business".

Applying this basic test, the Court then reviewed the particular facts and concluded that the Commission was within its discretion in finding that the shipper had not assumed enough of the burdens of transportation. In particular, the Court, like the Commission, focused on the financial burdens left with the owner-operator, including the risk of a "rise of variable costs such as fuel, repairs and maintenance", the risk of equipment loss or damage, and "the risk of non-utilization of high priced equipment." 368 U.S. at 379-380.

Two significant conclusions pertinent to the present inquiry can be drawn from the opinion in *Drum*. First, the opinion does *not* indicate that the statute requires the Commission to *presume* that leasing both equipment and driver from the same source constitutes for-hire transportation. Indeed the Court's opinion is in no way based on any such presumption. So long as we can reasonably conclude that the shipper bears the characteristic burdens of transportation to a significant degree, we may find

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[12] 368 U.S. at 384. The phrases "burdens of transportation" or "the characteristic burdens of the transportation business" (368 U.S. at 375) do not seem to have been employed in any Commission decision up to that time. However, the Court made clear that it was not formulating a new test of its own, but was simply restating in clearer language the "substance" test which it considered the Commission had been applying all along.

private carriage even though the equipment and driving services are leased from the same source.

Second, the Court's affirmance of the Commission's weighing of the financial burdens in the *Drum* case itself does not establish that that kind of financial burden analysis is statutorily required, or that those particular burdens must always fall on the shipper. The opinion makes clear that the Court was, at bottom, deferring to the Commission's considerable discretion in weighing the totality of factors on a case-by-case basis, and affirming it because it was not unreasonable. Thus, the Court clearly recognized, at 368 U.S. 375-76, that application of the "burdens" test in individual cases is a matter for our judgment:

> the problem is one of determining—by reference to the clear but broad remedial purpose of a regulatory statute committed to agency administration—the applicability to narrow fact situations of imprecise definitional language which delineates the coverage of the measure.

Later in its opinion, 368 U.S. at 384, the Court noted that the "Commission allowably dealt with this novel situation as an integral and unique problem in judgment, rather than simply as an exercise in counting common places. Nor did it leave the basis for its decision unarticulated." The Court also recognized that Congress gave us a "range of responsibility" when determining the definition of a particular operation. 368 U.S. at 385. The Court found the Commission's conclusion that financial risks are a significant burden of transportation to be well within that range. *Id.* Finally, the Court criticized the district court for attempting to inject its judgment into the agency's domain. 368 U.S. at 386.[13] All of these state-

[13] 368 U.S. at 385 Justices Harlan and Whittaker dissented; Justices Douglas and Black concurred in a brief statement calling the case "a marginal one on which commissioners as well as judges might differ." 368 U.S. at 386.

ments show that we have flexibility to determine when a private carrier has assumed the characteristic burdens of transportation.

In decisions subsequent to *Drum*, the Commission has often relied largely on the "burdens" (formerly "substance") test affirmed in *Drum*, which essentially answers the earlier "control" test, and leases by owner-operators to shippers have been upheld as private carriage. In *Ontario Company—Declaratory Order*, 112 M.C.C. 211 (1970), for example, the Commission found private carriage where owner-operators leased their rigs to a shipper for periods of 35 days at a time, were paid a fixed weekly rental and reimbursed their actual expenditures for fuel, oil, tolls, and en-route repairs, and were placed on the shipper's payroll. The lease agreements gave the shipper "exclusive possession and control", and the shipper specified the places and times of pickup and delivery (it allowed the owner-operators to select the route).[14] Similarly, in *Rayette, Inc.—Investigation of Operations*, 108 M.C.C. 410 (1969), the Commission summarily affirmed an Administrative Law Judge's finding of private carriage where owner-operators leased their rigs to a shipper from month to month and were paid union-scale wages plus certain additional sums for stop-offs and extra hours, and were reimbursed for tolls, extra labor, and fuel taxes. The separate rental fees for the trucks were calculated on a mileage basis, out of which the operators paid for fuel, oil, meals, lodging, and repairs and maintenance. The shipper established the delivery schedules, but the operators chose routes and rest stops. Equitable title to the equipment was in the owner-operators, but legal title was held in trust by the shipper (the trust being revocable on demand) to aid the owner-operators in obtaining both financing and state vehicle registration. The Administra-

[14] This decision was upheld on judicial review in *National Motor Freight Traffic Ass'n* v. *United States* (No. 480-71, D.D.C., Apr. 25, 1973) (complaint dismissed).

tive Law Judge, in distinguishing earlier cases such as *Drum*, cited particularly the shipper's holding of legal title to the equipment. The judge minimized the importance of the fact that the owner-operators rather than the shipper bore the risk of nonutilization of expensive equipment—a factor stressed in *Drum*—on the basis that here the risk was purely theoretical, since all the leased equipment and drivers had in fact been kept busy full time for many years.[15]

Subsequent to *Ontario* and *Rayette*, and up to the passage of the Motor Carrier Act of 1980, there have been no noticeable shifts in the Commission's decisional standards regarding leases of equipment by owner-operators to shippers, and it would appear to be a fair summary of the Commission's most recent pre-1980 Act policy to say that these arrangements will pass muster if the shipper assumes full control of the operation (which does not preclude allowing the owner-operator to choose his own routes, fuel stops, rest stops, and the like, or making him responsible for repairs and maintenance), if the owner-operator is placed on the shipper's rolls as an employee, if the shipper assumes a significant share, if not all, of the characteristic risks and burdens of transportation, and if the evidence as a whole does not make it appear that a subterfuge or device to evade regulation is involved.

2. *Leasing To Regulated Carriers.* The Commission's attitude toward owner-operator leases to regulated car-

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[15] See also *Lovell—Investigation of Operations*, 92 M.C.C. 728 (1963). There, an individual owning several rigs leased them to two shippers and provided drivers who were employed by him but who, the Commission found, became bona fide employees of the shippers. The shippers were found to be in exclusive control of the transportation operation. The Commission emphasized that the "burdens" test of *Drum* had not replaced the "control" test of *Church*, but merely supplemented it. It found that the lessor's assumption of significant financial risks did not remove the lease arrangement from the parameters of private carriage (92 M.C.C. at 734-735).

riers has taken an entirely different course. Such leases were common long before the passage of the Motor Carrier Act in 1935, and the Commission had to deal with their consequences in its grandfather licensing cases.[16] Beginning with *Dixie Ohio Exp. Co. Common Carrier Application*, 17 M.C.C. 735, 737-741 (1939) the Commission applied the test that operations with vehicles leased from owner-operators would be considered those of the lessee-carrier if they were "under its direction and control, and under its responsibility to the general public as well as to the shipper" (17 M.C.C. at 740), whether or not the driver was an employee. After tracing the subsequent development of the case law in this area, the Commission said in *Lease and Interchange, supra*, at 681:

> "It now seems to be accepted that when an authorized carrier furnishes service in vehicles owned and operated by others, he must control the *service* to the same extent as if he owned the vehicles, but need control the *vehicles* only to the extent necessary to be responsible to the shipper, the public, and this Commission for the transportation." (Emphasis added)

The Commission held that, where these tests are met, an authorized carrier may provide service with vehicles owned and operated by independent contractors. It may not, however, "farm out" its authority to others for operations in which it lacks "the elements of direct control over the movement and handling of freight, and of full responsibility to the shipper. . . ." (52 M.C.C. at 682).

In particular, the Commission's report nowhere suggests that owner-operators leasing their equipment to regulated carriers were themselves engaging in for-hire

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[16] A detailed historical review appears in Ex Parte No. MC-43, *Lease and Interchange of Vehicles by Motor Carriers*, 52 M.C.C. 675, 679-683 (1951) (hereinafter cited as *"Lease and Interchange"*). See also *H. B. Church, supra*, 27 M.C.C. at 200-201.

transportation requiring authority from the Commission, except where the lease was a sham and the owner-operator himself was holding out service to the public or controlling the transportation operation to an extent inconsistent with the control required of the regulated carrier. See *American Trucking Ass'ns* v. *United States*, 344 U.S. 298 (1953), upholding the Commission's right to adopt its leasing regulations.

Although the Commission's leasing regulations have undergone a variety of changes in the 30 years since they were first adopted, the requirements of control and responsibility by the lessee have remained constant. They are currently embodied in section 1057.12(d)(1) of the regulations:

> (d) *Exclusive possession and responsibilities.*— (1) The [written] lease shall provide that the authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease. The lease shall further provide that the authorized carrier lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease.

In contrast to leases to shippers, the Commission has not fashioned any presumptions, rebuttable or otherwise, where owner-operators have leased their rigs to regulated carriers.

The Commission's traditionally different approach to leases to regulated carriers is understandable in light of the regulatory environment in which it grew up. As recognized by the Supreme Court in the *Drum* decision, the definitional distinction between private and for-hire carriage grew out of a regulatory environment in which it was considered essential to limit diversion of traffic from the class of regulated carriers upon which most shippers had to rely for service, and the overall public interest was ultimately to be protected by comprehensive

Commission surveillance of the rates and services of licensed motor carriers. As long as the overall transportation service remained subject to regulation, as was the case where equipment lessors dealt only with regulated carriers, there was no likelihood of traffic diversion to the unregulated sector, and abuses could be dealt with through the exercise of the Commission's regulatory authority (including the imposition of leasing regulations) over the regulated carriers.

3. *Conclusions.* Neither the presumptions of for-hire carriage stated in *Church*, *supra*, and of defeasance of control by owner-operators, stated in *Oklahoma*, *supra*, nor the different standards of control for owner-operator leases to shippers vis-a-vis regulated carriers, is required by the language of the Motor Carrier Act. Both presumptions and the differing standards were devised by the Commission in pursuit of regulatory objectives, principally the protection of the regulated sector, at an earlier period in time.

In addition to creating a presumption of for-hire carriage by a lessor of equipment with driver to a private carrier/shipper but not to a regulated carrier, and otherwise maintaining different decisional standards in the two situations, the Commission has from time to time redefined the distinction between for-hire carriage by the lessor and private carriage by the lessee. The *Oklahoma Furniture* case represents an extreme development, where the Commission undertook to make the presumption of for-hire carriage virtually irrebuttable whenever equipment leased to a shipper was driven by the owner-lessor. Earlier cases, in particular *Pacific Diesel*, *supra*, on which the opinion in *Oklahoma Furniture* greatly relied,[17] suggested

[17] In particular, the record in *Pacific Diesel* disclosed a great deal of evidence showing that the lessor rather than the lessee was in actual control of the transportation service, notwithstanding recitals to the contrary in the written lease agreements. The evidence in *Oklahoma Furniture* was altogether different, closely resembling that in *Rayette*.

no such general conclusion, and contradicted the suggestion made in *H. B. Church* that the presumption could be rebutted by showing that the driver of leased equipment was the lessee's employee.[18] Later cases likewise retreated from the extreme position of *Oklahoma Furniture*, even though that decision was upheld by the Supreme Court.

Within quite broad limits, then, we believe the responsibility for drawing the line between private and for-hire carriage has been confided by Congress to the Commission's expert judgment, informed by its appreciation of the regulatory climate, policies, and needs of the time.[19]

Factors Favoring a Reappraisal

In *American Trucking Ass'ns* v. *Atchison, T. & S.F. Ry. Co.*, 387 U.S. 397, 415-16 (1967), the Supreme Court observed that administrative agencies have not merely the right but the affirmative duty to reappraise their regulatory policies periodically in light of changing conditions and circumstances affecting the industries they regulate. The changed conditions which persuade us that a change in policy is now appropriate are of two kinds: those which have occurred in the trucking industry generally since our earlier policies were adopted, and those specifically brought about by the Motor Carrier Act of 1980.

First, it is obvious that the motor carrier industry of today bears little resemblance to the precarious, fragmented, and unstable industry of the mid-1930's, which Congress undertook to rescue by the Motor Carrier Act of

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[18] The operation of equipment by the shipper's employee was offered in *Church as an example* of how the for-hire presumption could be rebutted. As such, we believe other factors relating to control are not, and in fact have not been excluded as methods of rebutting the presumption.

[19] In a subsequent decision, the Supreme Court cited *Drum* as authority for the proposition that "judicial review of . . . [the agency's] expert judgment is necessarily a limited one." *SEC* v. *New England Electric System*, 390 U.S. 207, 211 (1968).

1935. Common and contract carrier trucking has grown into one of the nation's major industries, with enormous revenues and a solidly established position as an indispensible major element in the nation's freight transportation system. At the same time, private carriage has also grown and solidified its position, transporting some 40 percent of the nation's traffic that moves by truck, and actually outnumbering regulated carriers by a ratio of approximately 9 to 1.[20] We do not believe that any action taken here will have a major effect on the overall balance between the regulated and private sectors of the industry.

What is at issue here is the ability of private carriers, like regulated carriers, to improve their overall efficiency by augmenting their fleets with equipment and drivers leased from owner-operators.[21] The Commission's past policy toward such leases has precluded private carriers from using this potential source of fleet augmentation. By changing our policy in this respect, we will open up this additional source of fleet augmentation to private carriers, while at the same time opening up an additional source of revenues to owner-operators, who have been particularly hard-pressed by both the present economic recession and the rapid escalation of fuel prices over the past several years.

No commentor has suggested any reason to conclude that allowing this method of fleet augmentation for private carriers will result in a significant change in the balance between the private and regulated sectors of the trucking industry.[22] Private carriers today are able to aug-

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[20] See U.S. General Accounting Office, "Issues in Regulating Interstate Motor Carriers" (June 20, 1978), at p. 13.

[21] For applicability to regulated carriers, see 49 U.S.C. § 10922 (f)(3). There is no similar statutory provision allowing private carriers to augment their fleets with equipment leased from owner-operators.

[22] It is notable that the major commentors who oppose a policy change in this area (i.e., the Motor Carrier Lawyers Association

ment their fleets by leasing equipment and hiring drivers from different sources,[23] so the ability to use owner-operators, i.e., equipment and drivers leased from a single source, for this purpose will hardly work any major change in the scope of their operations.

Second, the recent enactment of the Motor Carrier Act of 1980 makes it particularly appropriate to reappraise our policy toward leases of equipment with drivers to private carriers, in the light of the many changes made in the regulatory scheme. While Congress did not change the statutory definitions of private and for-hire carriage, it also did not undertake to write the Commission's past interpretations of the definitions into the statute itself.[24] The conclusion we draw is that Congress continues to rely on the Commission, as it has in the past, to establish the boundary line between private and for-hire carriage on a case-by-case basis of adjudication and periodic policy statements.

The Commission's determination of that boundary line has shifted in the past, both in terms of the practical arrangements presented, and in terms of the Commission's articulation of the tests to be applied and the emphasis it has chosen to give to various relevant factors in succeeding cases. We are fully aware of the statutory admonition that we not go beyond the powers vested in us by the Interstate Commerce Act and other legislation.[25] However, we must assume that Congress expects the Commis-

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and the various branches of the American Trucking Associations) confine their comments almost entirely to purely legal argumentation, with little or no discussion of practical consequences.

[23] See note 7.

[24] Compare the 1958 amendment to the definition of private carriage, which was expressly designed to write the Commission's "primary business" test into the statute. See *supra*, footnote 5.

[25] See section 3 of the Motor Carrier Act of 1980, Public Law 96-296, July 1, 1980.

sion to go on bearing the responsibility for drawing the line in light of existing law and regulatory policies.

Congress undoubtedly still wants a distinction to be maintained between regulated and private carriage, and we fully intend to maintain such a distinction. But we find in neither the language nor the legislative history of the 1980 Act any directive to confine private carriage to as narrow a scope as possible, or to employ presumptions no longer justified by present-day realities to interfere with legitimate interests of private carriers to augment their fleets through arrangements not fundamentally inconsistent with their status as private carriers.

The 1980 Act gives evidence that Congress also recognizes both private carriers and noncarrier owner-operators as legitimate branches of the overall trucking industry. Thus, in the interests of the private carrier industry, Congress carved out from the Commission's jurisdiction compensated intercorporate hauling.[26] Similarly, in the interests of the owner-operator industry, Congress expanded the scope of the exempt commodities that owner-operators may transport,[27] and further directed the Commission to allow a simplified fitness-only licensing procedure to grant owner-operators authority to carry food and agriculture-related commodities.[28] While none of the

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[26] 49 U.S.C. 10524(b) and (c), added by section 9 of the Motor Carrier Act of 1980, 94 Stat. 798. Compensated inter corporate hauling (CIH) is not private carriage; it is a limited category of for-hire transportation exempted from coverage under the Act, where the carrier and the shipper are both members of the same "corporate family" as defined in section 10524(c). The carriers benefitting from this new exemption, by and large, are those which have heretofore operated as private carriers. See Ex Parte No. MC-122 (Sub-No. 1), *Implementation of Intercorporate Hauling Reform Legislation* 45 Fed. Reg. 86761 (December 31, 1980).

[27] 49 U.S.C. 10526(a)(6), (11), (12), (13), as amended or added by section 7 of the 1980 Act, 94 Stat. 797.

[28] 49 U.S.C. 10922(b)(4)(E), and (b)(6), added by section 5 of the 1980 Act, 94 Stat. 794; See also 49 U.S.C. 10923(b)(5), and

cited provisions directly affect the question under consideration, they do demonstrate on the part of Congress an acceptance of the continued value of these branches of the trucking industry and a disposition to make provisions for them.[29]

Moreover, the 1980 Act gives evidence that Congress is much less concerned than it formerly was over the possibility of diversion of traffic from existing regulated carriers. New section 10922(b)(2)(B) provides that the Commission shall not find diversion of revenue or traffic from an existing carrier to be in and of itself inconsistent with the public convenience and necessity. It is true, as several commentors point out, that this provision is in the context of admission of new carriers into the regulated industry. It has no direct application to determining the boundary line between private and for-hire carriage. But the avoidance of diversion was never an end in itself. Rather, it was a policy adopted in order to achieve an earlier regulatory objective of maintaining a stable traffic base for a relatively limited number of regulated carriers—an objective which has now been subordinated by Congress in the Act in favor of heightened competition. Since fear of diversion of traffic from regulated to private

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Owner-Operator Food Transportation, 132 M.C.C. 521 (1981), 46 Fed. Reg. 19494 (March 31, 1981).

[29] Furthermore, the Commission in 1978 determined to allow private carriers for the first time to enter the regulated industry, in order to improve the efficiency and economy of their operations, without giving up their private-carrier operations or status. *Toto Purchasing & Supply Co., Inc.*, 128 M.C.C. 873 (1978); see also Ex Parte No. MC-118, *Grant of Motor Carrier Operating Authority to an Applicant Who Intends to Use it Primarily as an Incident to the Carriage of its Own Goods and its Own Nontransportation Business*, 43 Fed. Reg. 33945 (Aug. 2, 1978), and 43 Fed. Reg. 55051 (Nov. 20, 1978). Since Congress was well aware of this important change in Commission policy when it was drafting the 1980 Act, and took no steps to reverse the new policy, we believe it implicitly has Congressional approval.

carriers provided much of the motivation for the Commission's former policy, we think that Congress' lessened concern over traffic diversion can and should legitimately be considered in reappraising that policy.

We also think that the 1980 Act, by reducing the barriers to the entry of new carriers into the regulated industry, has also reduced any incentive such carriers might have to devise subterfuges to remain outside the reach of regulation. See *Pacific Diesel, supra.* Since the fear of subterfuges and evasion was a major part of the Commission's motivation in adopting its presumption of for-hire carriage in *Church, supra,* of control defeasance by owner-operators in *Oklahoma, supra,* and in scrutinizing owner-operator leases to shippers in subsequent cases, the greatly decreased incentives to evade regulation under the 1980 Act strongly suggest a reapprasial of both presumptions.

Finally, we think the new National Transportation Policy (NTP) for motor carriers of property adopted by the 1980 Act[30] calls for a reappraisal of our former policy. Several commentors insist that both the new and the old NTP apply only to regulated carriers, but in view of the over-all scope of the 1980 Act, and of its specific provisions cited above affecting private carriers and owner-operators, we think this contention is untenable.

We believe the whole tenor of the 1980 Act negates any such exclusive concern on the part of Congress for the regulated sector of the trucking industry. Congress certainly wanted to maintain a strong and viable regulated sector, because it knew that many shippers have relied and will continue to rely on that sector for their trucking needs. But we believe that Congress similarly wanted to maintain strong and viable private-carrier and owner-operator sectors, because it equally knew that many ship-

[30] 49 U.S.C. 10101(a)(7), added by section 4 of the 1980 Act, 94 Stat. 793.

pers have likewise relied and will continue to rely on private carriage.

It is with these thoughts in mind that we turn to a redefinition of the distinction between private and for-hire carriage in the context of leases of equipment with drivers to shippers.

Tests to be Employed

We have decided to eliminate the presumption announced in *H. B. Church, supra*, that leases of equipment with drivers to shippers ordinarily give rise to for-hire transportation by the lessor rather than exempt private carriage by the lessee. As noted above, any incentives to indulge in "subterfuges and devices to evade regulation" (*Church*) have been so far reduced under the current regulatory scheme of relaxed entry that no such presumption any longer seems appropriate.

No commentor has suggested any persuasive reason why such a presumption should be retained. The Commission created the presumption in pursuit of earlier regulatory objectives, and can now discard it as obsolete in light of current objectives. We believe the presumption no longer serves any useful purpose. If the circumstances surrounding a particular lease arrangement suggest that a "subterfuge or device" to evade our authority may be present, we have ample means to penetrate any such evasive scheme and ascertain the facts.

For similar reasons, we will remove the presumption raised in *Oklahoma Furniture* that whenever an owner-operator drives his own equipment, there is present the right and power to defeat any supposed right of control that the shipper/lessee may believe exists. There appears to be no reason for the imposition of this presumption on owner-operator-shipper leases, and no commentor specifically addressed its retention. In removing it, the way will be cleared for the consideration of convincing facts tending to show control by the shipper, which facts could not

heretofore vitiate the conclusion of unauthorized for-hire carriage where an owner-operator leased his equipment to a shipper.

We conclude that there is no longer any justification for maintaining different standards in judging lease arrangements with drivers, depending on whether the lessee is a private or for-hire carrier. Disposing of the presumptions just discussed will equate the private sector with the regulated sector, which is free from presumptions that wrest away a carrier's control over an owner-operator. Analytically, the question of whether the provider of equipment with driver under a lease arrangement is simply acting as a traditional lessor of the instrumentalities of transportation, or instead is providing a transportation service itself under the guise of an equipment lease, does not at all depend on the identity of the lessee.

Some commentors assert that the status of a lessor of equipment with driver to a shipper is fundamentally different from that of a similar lessor to a regulated carrier because the former holds his service out to the general public while the latter holds it out only to regulated carriers. This analysis is faulty because it avoids the basic question of precisely *what* it is that the lessor in such cases is holding out.

The crucial element, we believe, is precisely what services a lessor holds out to perform. If he holds out what is in substance a complete transportation service for compensation, then he is acting as common or contract carrier, depending on whether he holds out to the public (or a definable segment thereof) or only to selected shippers. If he holds out only the use of instrumentalities of transportation, *i.e.*, trucks and drivers, then he is not acting as a carrier for hire no matter how widely his service is held out.

The true distinction can best be understood by looking at the situation primarily from the shipper's point of

view. The underlying business reality is that contract and common carriers on the one hand, and lessors on the other, sell different services. The services sold by leasing companies are called factor inputs: vehicles, labor, and closely associated items, such as vehicle maintenance. They do not sell transportation because they do not determine the best way to utilize these resources in order to move freight. A contract or common carrier, however, in addition to providing all the services of a lessor, also combines the resources in order to produce a separate composite product: a transportation service. This requires that, unlike the lessor, the contract or common carrier must possess and provide the key management and organizational functions that characterize a transportation company. These include dispatch, scheduling movements, and general coordination.

From the shipper's point of view, the difference between use of a contract carrier and a lessor (whether an owner-operator or commercially leased equipment and drivers) is the amount of control and responsibility that must be exercised and assumed. If the shipper itself performs the functions necessary to convert the labor and capital inputs into transportation, then it is a private carrier and the arrangement with the lessor of vehicles and/or drivers is a true lease. If the shipper turns over these responsibilities to the lessor, then it is not a private carrier, and its partner in the transaction is a for-hire carrier. The key to the distinction, both in the marketplace and in law, is the issue of control. To effectively perform the transportation service, the carrier (private or for-hire) must have control over the major factor inputs (labor and vehicles). Thus, a truck-leasing firm, including one that undertakes for a fee to service and maintain the leased equipment, is clearly not a for-hire carrier unless its service goes considerably farther and encompasses the actual provision of an organized transportation service.

Another reality of the marketplace is that the typical owner-operator, that is, the individual who owns a single vehicle which he also drives, with no further organization or employees except perhaps a substitute driver, is ordinarily not in a position to offer a shipper a complete transportation service comparable to that typically offered by a common or contract carrier. The functions of dispatching, scheduling, and coordination of freight shipments are simply beyond his capabilities. Even in his recognized role as transporter of exempt agricultural commodities, the owner-operator typically finds it necessary to work through such intermediaries as brokers, who perform the complementary functions of a transportation service he is not able to provide.

Thus, a shipper that uses the services of an owner-operator will typically have to perform for itself those additional functions which transform the capital and labor inputs (vehicle and driver) into a total transportation service, simply because the owner-operator will not be capable of performing them satisfactorily.[21] If the shipper is unprepared or unwilling to perform these integrative functions for itself, then it will turn to a contract or common carrier, whose services are readily available. We do not see any significant likelihood that individual owner-operators will be able to offer shippers services that will be functionally equivalent to, or competitive with, the services of authorized common or contract carriers. Owner-operators may well be able to offer services which cost less than those of common or contract carriers, but only because they will be fundamentally different, less complete services, *i.e.*, the provision of factor inputs which

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[21] This is equally true whether or not the shipper already has a fleet of trucks which it operates with employee drivers. If it does, it will presumably already be performing the integrative and management functions typical of a carrier; if it does not, either it will have to employ additional management personnel to perform these functions, or they will have to be added to the duties of existing management personnel.

the shippers themselves will have to organize and fashion into a transportation service.

Authorized carriers which today use the services and equipment of owner-operators must add their own services of dispatching, scheduling, and general coordination, prior to selling the resultant transportation service to shippers. If owner-operators are permitted to lease their equipment and driving services directly to shippers, the shippers will have to undertake the functions currently performed by the authorized carriers. Whether the latter arrangement will be economically attractive to a shipper will depend simply on whether his cost for performing these functions is greater or less than the authorized carrier's charge for performing them.

This form of product competition, made possible by removing the regulatory obstacles to the use of owner-operator services by shippers and private carriers, will in our judgment further the objectives of the Motor Carrier Act of 1980, particularly in the promotion of competitive and efficient transportation services in order to meet the needs of shippers, receivers, and consumers; to allow a variety of quality, price, and service options to meet changing market demands and the diverse requirements of the shipping public; and to allow the most productive use of equipment and energy resources—the last because owner-operators will have a broader market for their services and private carriers will have an additional source of fleet augmentation to meet their changing transportation needs.

In contrast to individual owner-operators, large equipment leasing companies are typically quite capable of performing the additional management functions which turn the capital and labor inputs into a complete transportation service. Thus, we intend to scrutinize carefully those leasing arrangements with drivers where the lessor obviously has the capability of providing the key organiz-

ing and management functions that characterize a transportation company, particularly in situations where the lessee's ability to perform these functions for itself may be in question.

What remains, therefore, is the test or tests to be applied in drawing the necessary legal distinction between for-hire carriage by the lessor of equipment with driver vis-a-vis regulated or private carriage by the lessee, depending on whether the lessee is a regulated carrier or shipper. Our tests will naturally focus on the factors of *control* and *responsibility* and on the critical organizing and management functions which transform raw factor inputs into an integrated transportation service. Control is of primary importance to us because without assured control, the lessee of equipment with driver cannot perform the critical organizing and management functions. Responsibility follows from control, and the lessee's acceptance of responsibility serves to verify the reality of its control. The organizing and management functions, of course, are the very elements that separate the mere provision of factor inputs from the performance of an integrated transportation service.

We will not restrict our inquiry to the formal recitals of the lease agreement, but will—as in past—examine all surrounding facts and circumstances and the actual conduct of operations under the lease to ascertain if the true substance of the arrangement is in accord with that recited in the formal agreement.

Our renewed emphasis on control and responsibility does not mean we are no longer concerned with "the characteristic burdens of transportation"—the corollary test used to determine control in *Church*, articulated in *Drum*, and followed in later Commission cases.[32] The con-

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[32] In this respect, as is evident, our thinking relative to control has undergone refinement since the publication of our original notice of proposed policy statement.

siderations inherent in this test will continue to be taken into account, not as a separate test, as suggested in *Drum*, but rather as part of the examination of the greater and primary issue of control. Performance of the critical organization and management functions that create a true transportation service, and the exercise of control necessary in order to do so, are in our view the two most important "characteristic burdens of transportation". Moreover, additional characteristic burdens flow from the responsibilities the lessee must accept, the most important being liability to the public for injuries caused by the transportation operation, responsibility for compliance with safety regulations, and risk of loss or damage to the cargo, all as discussed in greater detail below.

Our present view of what the term "characteristic burdens of transportation" encompasses is not the same as that utilized in the Commission's earlier decisions. Specifically, we do not see great relevance in the degree of predictability either of the cost of transportation to the lessee-shipper, or of the compensation of the lessor-owner-operator. These and other questions concerning the form and calculation of payments by the lessee to the lessor are matters of bargaining between the parties, and in most cases will have little bearing on which of the parties is in substance providing the transportation service, as analyzed above.

Similarly, we do not see the relevance of which party to the transaction bears the risk of idleness or non-remunerative use of equipment. This is undoubtedly a burden, but not one necessarily characteristic of a transportation service. A shipper can clearly shift this risk from itself to an equipment-leasing company, without in any way relying on the latter to perform the key organizational and management functions of a transportation service; and it has not been suggested in such cases that the lessor of equipment without drivers, merely by assuming this risk, becomes a for-hire carrier. The pre-

vailing method of compensating owner-operators who lease to regulated carriers—payment of a fixed percentage of the revenues earned by the carrier for its use of the leased equipment—puts the risk of idleness or nonremunerative use (empty backhauls) squarely on the owner-operator, yet this has not been treated as making him a for-hire carrier.[33] We are convinced this risk is more properly a matter for bargaining between the parties, and that appropriate adjustments in price will be made depending on which party bears the risk of idleness or nonproductive use of equipment, or how they share that risk, without the necessity of drawing inferences as to which party is in substance performing the transportation service.

Accordingly, while we will take all relevant factors into account, we intend to focus on control, responsibility, and the performance of key organizing and management functions of a transportation service as the critical elements in determining who is performing the service, and in characterizing the type of carriage being performed. Where control, or responsibility, or performance of the key organizing functions is unclear, we will endeavor, without introducing any presumptions or preconceptions, to ascertain where each of these factors predominantly lies. If we find that the lessor is in practice performing the functions characteristic of a transportation service, we will conclude that that lessor is performing an unauthorized common or contract carrier service. If the evidence is unclear or in conflict, we will attempt to see where the factors predominantly point.

As to the degree of control and responsibility that must be exercised by the lessee to show that it rather than the lessor is performing the transportation service, we will adopt the test stated for similar leases in the regulated

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[33] The Commission's original leasing regulations outlawed compensation based on a percentage of revenues, 52 M.C.C. at 726, but this provision was subsequently repealed.

sector in *Lease and Equipment, supra*, 52 M.C.C. at 681, and quoted above at p. 14:

> . . . [W]hen an authorized carrier furnishes service in vehicles owned and operated by others, he must control the *service* to the same extent as if he owned the vehicles, but need control the *vehicles* only to the extent necessary to be responsible to the shipper, the public, and this Commission for the transportation. (Emphasis added)

When a private carrier furnishes service in vehicles owned and operated by others, it must control the service to the same extent as if it owned the vehicles, but need control the vehicles only to the extent necessary to be responsible to the public and the Department of Transportation.

The above are the minimum requirements that must be met in a lease of equipment and driver to a shipper in order to have the arrangement viewed as private carriage conducted by the shipper-lessee. If actual operations conducted under the lease accurately reflect our requirements, a presumption will arise that the transportation being performed is private carriage controlled by the shipper. This presumption may be rebutted with a showing that actual operations, in any respect, tend to weaken the control and responsibility required of a shipper-lessee when conducting transportation operations with equipment and drivers leased from a single source. Appendix B contains sample lease language that meets the minimum requirements and establishes the presumption. The preceding requirements are particularized as follows:

(1) The lease agreement must provide, and the surrounding facts must reflect, that the leased equipment is exclusively committed to the lessee's use for the term of the lease,[24] for any purpose consistent with the provisions

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[24] This implies that the lease must have some definite and ascertainable term, which will be discussed *infra*. This requirement is

of the lease. This requirement does not preclude the lessor's own use of the equipment during periods of the lease when it is not being utilized by the lessee. We see no reason why a lessee cannot sublease the equipment to a third party if the lease so permits. We caution, however, that a private carrier lessee may presently not sublease to an authorized carrier for periods less than thirty days. This issue is the subject of a pending proceeding docketed in Ex Parte No. MC-43 (Sub-No. 12), *Leasing Rules Modifications* (46 Fed. Reg. 15300, March 5, 1981).

(2) The lease agreement must provide, and the surrounding facts and actual operations must show, that the lessee has exclusive dominion and control over the transportation service conducted by it with the leased equipment during the term of the lease. It is not inconsistent with such control over the transportation service to allow the driver of the equipment to select routes, fuel stops, rest stops, repair stops, and perform other ministerial matters relating to control of the vehicle. It is inconsistent with his status as a simple lessor, however, to delegate to him managerial elements of control over the transportation service provided.[25]

(3) The lessee must maintain public liability insurance or otherwise accept responsibilty to the public for any injury caused in the course of performing the transportation service conducted by it with the equipment during

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not inconsistent with a provision making the lease renewable by either party, or terminable by either or both parties on specified notice. It is similarly not inconsistent with the lessee's full and exclusive right of use to provide in the lease that the lessor may use the equipment for his own purposes at such times during the period of the lease as the lessee has no use for it.

[25] An owner-driver may perform such functions in loading and unloading as an employee would ordinarily perform, consistent with industry practice, but he should not be called on to perform such managerial functions as the hiring of additional employees for loading and unloading.

the term of the lease. To this end, the equipment must display appropriate identification showing operation by the lessee during the performance of such transportation. The ultimate liability (including any liability for damages in excess of insurance policy limits) will remain on the lessee.[36] This will be a significant protection to the public, since both a shipper/private carrier and a regulated carrier perform essentially the same service, and should be similarly responsible for public injury. As a practical matter, shippers will generally be better able both to afford adequate insurance coverage and to respond in damages than a typical owner-operator.

(4) The lessee must accept responsibility for, and bear the cost of, compliance with safety regulations during performance by it of any such transportation service. This is not inconsistent with a requirement that the driver pay any traffic fines he may incur, but responsibility for infractions over which the lessor has no control should remain on the lessee, who, in an overload situation, for example, controls the amount of cargo loaded as a managerial element of the transportation service.

(5) The lessee must bear the risk of damage to the cargo, subject to any right of action it may have against the lessor for the latter's negligence. This could be covered by cargo liability insurance or other means, such as self-insurance. This means that a private-carrier lessee—since the driver is merely its agent and the cargo never leaves its possession—cannot look to the lessor to bear the typical insurer's liability of a carrier.[37]

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[36] The lessee's acceptance of responsibility to the public is not negated by any right of action it may have against the owner-operator for injury caused by the latter's negligence.

[37] A common carrier bears an insurer's liability to its shipper in most circumstances, subject to reasonable limitation by tariff provision; a contract carrier's liability to its shipper is a matter of contract. A clause in a lease agreement making and equipment lessor liable for cargo loss would thus tend to indicate either com-

(6) The term of the lease must be for a minimum period of 30 days. We will focus on the standard of control used in owner-operator leases to private carriers, as we have in the past concerning such leases to regulated carriers. It would be inconsistent to permit private carriers to engage owner-operators for less than 30 days, while requiring a 30 day minimum of regulated carriers as an indicator of control. A lesser minimum period would also confer an economic tool upon private carriers, which could be used to the detriment of for-hire carriers.

The foregoing are conditions that are normally assumed by authorized carriers in holding out their service to the public. We believe they are indispensable to show that the lessee rather than the lessor of equipment with driver is performing the characteristic functions of a carrier. In including these conditions but excluding others (which may be viewed by some commentors as indispensable), we believe we are acting "well within the range of the responsibility Congress assigned to the Commission." See *United States* v. *Drum*, *supra*, 368 U.S. at 385.

There remain a number of other features of lease agreements that are not conclusive on the issue of control, but may nevertheless be entitled to weight in characterizing leasing arrangements which are presented as private carriage. We list the following, without intending to exclude consideration of other features which have been discussed in past cases or may be found to be significant in future ones:

(1) *Whether the lease agreement is in writing.* This is not an indispensable element of a valid contractual agreement, absent some applicable state law to that effect, and we have no authority to impose it on private car-

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mon or contract carriage; a clause negating such liability by the lessor would tend to negate common carriage, though not necessarily contract carriage.

riers as we have in the case of regulated carriers which lease equipment from owner-operators or other carriers.[38] However, the best evidence of the minimum requirements and other provisions entitled to weight in determining whether a leasing arrangement is private carriage is a written lease. It follows that we will subject oral leases to more careful and detailed scrutiny than written leases.

(2) *Whether the lease is for round trips.* One-way leases may facially be inconsistent with the exclusive commitment requirement, and with performance by the lessee of the key organizing and management functions which distinguish a true transportation service from the mere provision of instrumentalities. However, as we observed earlier, a provision in a lease agreement allowing the lessor to use the equipment for his own purposes during the period of the lease when the lessee has no need for it would not necessarily be inconsistent with the lessee's full and exclusive right of use. Thus, where the lessee has freight moving in one direction only, we do not believe that the concept of exclusive commitment is compromised or mitigated where, consistent with the terms and provisions of the prime lease, the lessor executes a concurrent and more or less complementary lease for backhaul purposes and repositioning of equipment.

(3) *Whether the driver becomes the lessee's employee.* A requirement to this effect was considered but never imposed by the Commission when it was first reviewing owner-operator leases to regulated carriers.[39] On the other hand, employment of owner-operators has been perceived as being a requirement in the case of their leasing to shippers, in order to avoid a finding of unauthorized

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[38] 49 C.F.R. 1057.11(a).

[39] See *Dixie Ohio Exp. Co. Common Carrier Application*, 17 M.C.C. 735 (1939).

for-hire carriage by the lessor.[40] The result has been to preclude the latter type of lease, since very few owner-operators have been willing to give up their status as independent contractors. Although acceptance of such status is certainly confirmatory evidence that the lessee exercises exclusive possession, control, and dominion of the transportation service, we believe an owner-operator can maintain his status as an independent contractor without necessarily extending the scope of his holding out beyond the use of his equipment and his own services as a driver, or negating the lessee's exclusive possession and control. Any intimations to the contrary in our past decisions are expressly negated.

(4) *Whether the equipment is sometimes driven by a person other than the owner-operator or someone selected by him.* While not essential, this is obviously a factor tending to show that the lessee is in full and exclusive command of the transportation operation.

(5) *Whether the lease is of tractor only, or of tractor and trailer.* The lessee's ownership of the trailers pulled by leased tractors tends to show it as bearing a burden of transportation, though not one of the essential ones (see our earlier discussion).

(6) *Who assumes the risk of loss or damage to the equipment, and who pays for fire, theft, and collision insurance thereon.* This is essentially a matter for bargaining between the parties. Requiring the owner-operator-lessor to bear these risks and costs is not necessarily inconsistent with performance of the carrier role by the lessee; but if the lessee agrees to bear these risks and costs, it tends to strengthen its assertion of control.

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[40] No Commission decision has flatly required this, but it has not escaped attention that the only cases of owner-operator leases to private carriers which were upheld by the Commission as constituting private carriage have in fact been those where the owner-operators became employees. See, e.g. *Ontario Company—Declaratory Order*, 112 M.C.C. 211 (1970).

(7) *Whether the lessee pays or reimburses the driver for such expenses as fuel, oil, tolls, en-route repairs, and loading/unloading charges.* A fixed allowance per mile covering some or all of these expenses is not inconsistent with a true lease situation. See *Rayette, supra.* Neither is a negotiated lump-sum payment covering some or all such expenses. If the lessee specifically pays or reimburses them, however, that fact is further evidence that it performs and controls the transportation function.

(8) *Whether the lessor is required to repair and maintain the equipment.* Equipment leasing companies often offer this service, for a fee, in connection with long-term leases, without any implication of for-hire carriage on their part. The same absence of implication should apply to owner-operator lessors, regardless of whether they charge a fee for this service.

(9) *Whether the lease provides for some fixed minimum payment, regardless of use.* A provision for a minimum payment is relevant but not essential. Although the risk of nonutilization was a factor stressed in *Drum*, we agree with the Administrative Law Judge's assessment in *Rayette* that this factor is purely theoretical where the equipment is kept busy, and thus is not a significant burden of transportation which can be of assistance in resolving the primary issue of control.

(10) *Whether the lessee is assisting the lessor finance the equipment, and/or whether it holds legal title in trust for the lessor.* This is a strong factor showing assumption by the lessee of a "burden of transportation", which helps to answer the control issue. See *Rayette, supra.*

Conclusion. As stated at the outset, the foregoing is not intended to be an exhaustive listing of all the factors which have been or may be found to be relevant to the determination of whether a particular private operation conducted with leased singly-sourced equipment and drivers is in fact private carriage. We think, though,

that the foregoing factors reasonably and clearly indicate how we will deal with other factors that may tend to establish who has control. We repeat that the foregoing 10 factors are peripheral, and that we expect to focus most of our attention on the six essential elements of a lease arrangement discussed earlier.

We are well aware that the parties to such arrangements want practical assurances that their operations will not be suddenly overturned on some technicality or other. Appendix B contains sample lease language which meets the minimum requirements for control where a shipper leases equipment and drivers from a single source. Properly executed, a lease form containing this language raises the presumption of a private carriage conducted by the lessee. Our inquiries will ascertain whether the actual operations are an accurate reflection of the language set forth in the lease. We believe that the discussion in this policy statement will give all affected parties sufficiently clear guidelines so that they can order their affairs with confidence.

Further Arguments by Opponents

The opponents of our proposed policy statement make a number of arguments that are neither procedurally nor directly related to the issue of where the line should be drawn between private and for-hire carriage. Several of these arguments suggest that owner-operators will not really benefit from our proposed policy change. We cannot help noticing, however, that these arguments come not from the owner-operators themselves but from members and representatives of the regulated industry, whose interests here are rather plainly opposed to those of the owner-operators.

1. *Master Licensing.* A major contention of certain commentors is that adoption of the proposed policy state-

ment would be tantamount to a form of master licensing prohibited by the Motor Carrier Act of 1980.[41]

These commentors misunderstand the nature of our policy statement. The master licensing prohibition is designed to prevent the Commission from announcing in a rulemaking proceeding general findings of public convenience and necessity which would not thereafter be subject to reexamination in any subsequent individual licensing proceeding. The Congressional prohibition was in response to specific Commission proposals of this type; see, for example, *Chemical Leaman Tank Lines, Inc.* v. *United States*, 368 F. Supp. 925 (D. Del. 1973). The statutory ban is expressly limited to Commission licensing proceedings. Our instant proposal is not a licensing proceeding, however, and makes no findings of public convenience and necessity. It simply advises the public in general terms when we believe our regulatory jurisdiction will ordinarily be triggered. As the previous discussion makes clear, owner-operators will not under our policy statement be able to operate in the same manner as licensed carriers.

2. *Absence of Existing Protection for Owner-Operators.* Many commentors correctly point out that owner-operators who lease to private carriers will not be covered by the various protections of the so-called "truth-in-leasing" regulations.[42] This effect, they contend, is con-

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[41] P.L. 96-296, 94 Stat. 793, § 5(b)(3) and § 10(a)(6); 49 U.S.C. 10922(b)(3) states "The Commission may not make a finding relating to public convenience and necessity under paragraph (1) [of subsection 10922(b)] which is based upon general findings developed in rulemaking proceedings." 49 U.S.C. 10923 (a)(6) makes essentially the same language applicable to applications for contract carrier permits.

[42] 49 C.F.R. 1057.12; Ex Parte No. MC-43 (Sub-No. 7), *Lease and Interchange of Vehicles*, 131 M.C.C. 141 (1980), *aff'd sub nom. Global Van Lines, Inc.* v. *I.C.C.*, 627 F.2d 546 (D.C. Cir. 1980).

trary to congressional concern and to the statute itself. We disagree.

Owner-operators need not lease to private carriers unless they wish to do so. In many cases, the protections which our regulations accord owner-operators when they lease to regulated carriers may encourage them to retain their association with the latter.

We believe owner-operators should be given the choice of leasing their services and equipment in either a regulated or an unregulated environment. In return for relinquishing the truth-in-leasing protections enjoyed while under lease to a regulated carrier, the owner-operator can negotiate his own protective arrangements with the private carrier. In the final analysis, however, we have no jurisdiction to impose on owner-operator leases to private carriers the regulatory protections which owner-operators now enjoy when leasing to regulated carriers.

The fuel surcharge issue is similarly tendered by opponents of the proposal as an existing owner-operator benefit which would be lost if this policy is effected. The fuel surcharge program[43] was designed to compensate owner-operators for their increased costs of fuel by means of a surcharge on the gross transportation charges which must be remitted by the carrier to the owner-operator. The surcharge program has been eliminated, with compulsory mileage-based compensation taking its place.[44] As with the truth-in-leasing protections, we have no jurisdiction to impose a fuel payments program upon private carriers. However, with an opportunity to negotiate leasing charges directly with individual shippers,

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[43] Ex Parte No. 311 (Sub-No. 1), *Expedited Procedures for Recovery of Fuel Costs*, decision served June 4, 1979.

[44] Ex Parte No. 311 (Sub-No. 4) *Modification of the Motor Carrier Fuel Surcharge Program* 46 Fed. Reg. 50070 (October 9, 1981), 47 Fed. Reg. —— (————, 1982).

owner-operators can ensure that their fuel costs are considered, thus obviating the need for a supplemental fuel payment.

3. *Compensated Intercorporate Hauling.*—Our original proposal noted that in a related proceeding, we concluded that compensated intercorporate hauling (CIH) operations performed by a corporate subsidiary established for the specific purpose of providing for-hire transportation solely for its parent and/or corporate affiliates are exempt under the Motor Carrier Act.[45] This conclusion was affirmed in the adoption of final rules in that proceeding.[46]

A commentor has questioned whether owner-operators may lease directly to a separately-incorporated subsidiary engaged solely in CIH operations pursuant to the rules set forth in Ex Parte No. MC-122 (Sub-No. 1).

The unquestionable intent of Section 9 of the 1980 Motor Carrier Act is to exempt intercorporate hauling from the Commission's regulatory jurisdiction, once the limited formalities of notice and publication are complied with, to the same extent as private carriage has heretofore been exempted. While we have no jurisdiction to regulate intercorporate hauling, we do retain our authority to determine what constitutes intercorporate hauling within the confines of the statute.

A corporate transportation subsidiary which handles the transportation requirements of its parent or affiliates is effectively a private carrier. We therefore see no basis

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[45] Ex Parte No. MC-122 (Sub-No. 1), *Implementation of Intercorporate Hauling Reform Legislation* 45 Fed. Reg. 45526 (July 3, 1980). Compensated Intercorporate Hauling was established by Section 9 of the Motor Carrier Act, and is exempt from our jurisdiction once the ministerial formality of notice (and subsequent publication) is complied with.

[46] Ex Parte No. MC-122 (Sub-No. 1), *Implementation of Intercorporate Hauling Reform Legislation*, 45 Fed. Reg. 86761 (December 31, 1980).

for precluding legitimate leasing by owner-operators or others to intercorporate haulers, regardless of whether they are separately incorporated. We stress, however, that a corporate subsidiary wishing to engage in exempt compensated intercorporate hauling by leasing vehicles and driver services from owner-operators must assume the characteristic burdens of transportation in exactly the same manner as does a private carrier operating without a transportation subsidiary. If a transportation subsidiary leased vehicles and driver services from owner-operators, but did not assume the characteristic burdens of transportation, the owner-operator, and not the transportation subsidiary, would be rendering the transportation service to the corporate family. Because such an arrangement would not fulfill the requirements of section 10524(b) that the transportation for the corporate family be "provided by a person who is a member of a corporate family", the arrangement would constitute provision of for-hire transportation, subject to our jurisduction, and not exempt private carriage.

4. *Highway Safety.* Several commentors assert that adoption of our proposal will be detrimental to highway safety. They point to expressed Congressional concerns for the continued safety of motor carrier operations,[47] concerns which resulted in the enactment of sections 29 and 30 of the Motor Carrier Act of 1980.[48] Commentors claim that allowing owner-operators to enter into short-term leases (i.e., those of less than 7 days' duration) with shippers would bring the owner-operators within an

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[47] See H.R. Rep. 96-1069, 96th Cong., 2nd Seas., pp. 6, 41-43.

[48] Section 29 requires filing evidence of insurability (bond, insurance policy, or other security approved by the Commission) prior to the issuance of a certificate or permit. Section 30 establishes minimum levels of financial responsibilty for persons engaged in the motor carriage of property utilizing vehicles having a gross vehicle weight of 10,000 pounds or more. 49 U.S.C. 10927(a)(1); 94 Stat. 820.

exception to the Federal Motor Carrier Safety Regulations [49] concerning the qualifications of drivers. Carriers which utilize drivers falling within the exception for "intermittent, casual, or occasional drivers" are not required to investigate those drivers' qualifications or their past safety violations, or to review their driving records annually.[50] Commentors contend that to allow private carriers to take advantage of this exception would defeat the beneficial results sought to be obtained by Congress in enacting sections 29 and 30, and flatly assert that private carriers using owner-operators on an "intermittent, casual, or occasional" basis will be prone to a higher incidence of highway accidents.

Insofar as leases to private carriers must be of 30 days duration, at minimum, the same as for regulated carriers, these arguments are without merit. Nevertheless, we must emphasize that the primary jurisdiction over motor vehicles safety regulation is vested in the Bureau of Motor Carriers Safety of the Department of Transportation, and requests for any regulatory changes should be addressed to DOT.

5. *Leases by Commercial Lessors.* Many commentors insist that commercial equipment lessors cannot be excluded from the scope of our policy statement and that any attempt to do so would arbitrarily discriminate between owner-operators and commercial lessors. Other commentors assert that leases of equipment with drivers by commercial lessors to private carriers would automatically constitute for-hire transportation by the commercial lessors for which authority would be required.

Our earlier analysis of the fundamental distinction between leasing and for-hire carriage convinces us that commercial lessors, like owner-operators, may lease

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[49] 49 C.F.R. Part 396.

[50] 49 C.F.R. § 191.63.

equipment with drivers to shippers without becoming for-hire carriers. The same principles governing the distinction between private and for-hire carriage would be equally applicable to leasing companies and owner-operators. Many commercial leasing companies, if they supplied drivers for the equipment they leased, might want to take the final step and offer their customers a full transportation service. For this they would of course require Commission authority.[51] As we pointed out earlier, the large commercial leasing company that leases equipment with drivers to private carriers has a greater potential for entering the field of for-hire carriage than does the typical owner-operator. We expect to scrutinize such leasing arrangements with care in light of the typically greater ability of commercial lessors to engage in for-hire carriage.

6. *Leases by Authorized Carriers.* Regulated carriers are precluded from leasing equipment, with or without drivers, to private carriers or shippers under most circumstances by Subpart E of the leasing regulations.[52]

As a matter of legal analysis, however, we see no reason why authorized carriers cannot lawfully engage in the leasing of equipment with drivers to private carriers

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[51] See, for example, *Pacific Diesel Rental Co.—Investigation of Operations*, 78 M.C.C. 161 (1958), a case in which the Commission held that the "lessor" was, in fact, engaged in for-hire carriage, and which would probably be decided the same way under our proposal.

[52] 49 C.F.R. § 1057.41. This section sets out four exceptions to the general ban on authorized carrier leasing to private carriers or shippers: (a) Leases with or without drivers are permitted for transporting newspapers or for local cartage within a commercial zone (49 U.S.C. 10526(a)(7) and (b)(1); (b) leases with drivers are permitted when the carrier's certificate or permit specifically so provides; (c) leases without drivers are permitted where the cargo is moving on railroad bills of lading; and (d) leases without drivers are permitted where approval of the rental contracts has been obtained from the Commission.

just as other lessors can. On the other hand, regulated carriers obviously have the capability of performing those functions which characterize a for-hire transportation service, and indeed it is just those functions that they hold themselves out to the public as being ready, willing, and able to perform. Were authorized carriers allowed to lease equipment with drivers to private carriers, the former would have to make it very clear to a prospective lessee that it was *not* undertaking to perform these management functions with respect to the leased equipment and drivers. If it did not in fact perform them, the arrangement could perfectly well be held a *bona fide* lease and valid private carriage by the lessee, assuming our six criteria described above were met.

In such circumstances, it would be solely the bar of the existing regulation that would preclude an authorized carrier from leasing equipment with drivers to a shipper or private carrier.

Accordingly, we will institute a proceeding to determine whether Subpart E of the leasing regulations should be repealed or modified to bring it into line with the policy adopted here.

7. *Tax Status of Owner-Operators Leasing to Private Carriers.* Some commentors assert that owner-operators who lease to private carriers under our proposal would be treated as employees for tax purposes, because of the degree of control the private carrier would have to exercise to establish true private carriage. This argument has little relevance to our regulatory functions. For general legal purposes, we held long ago that a regulated carrier can carry on its service with equipment leased from owner-operators as independent contractors, and it is our understanding that owner-operators are not typically treated as employees for tax purposes when they lease to regulated carriers. *Lease and Interchange, supra,* 52 M.C.C. at 681. The tests we will apply henceforth will

require no greater degree of control where the lessee is a private carrier than where it is a regulated carrier, and we have specifically repudiated any past implication that an owner-operator-lessor leasing to a private carrier must become an employee.[53]

8. *Definition of "Private Carrier"*. Some commentors are concerned that our use of the term "private carriers" in the title of this proceeding implicitly restricts the applicability of this policy to those shippers with existing private carriage fleets. This is not our intent. A private carrier is in essence a shipper or manufacturer which transports its own goods.[54] We see no distinction between use of this policy to augment existing private carriage operations or to inaugurate new private carriage service. Thus, where the term "private carrier" has been used, the word "shipper" may be substituted so as not to preclude the lease of equipment and drivers to those shippers without existing private carriage operations.

Environmental and Energy Considerations

As noted in the proposed policy statement, it is expected that the proposed action will "improve operating efficiencies, reduce empty mileages, and increase productivity of revenue equipment, thus contributing to the conservation of energy resources". In an analysis prepared for the Federal Energy Administration,[55] the Charles River Associates, Inc., found that restrictions on leasing equipment to other carriers and restrictions on mixing exempt, contract, private, and common carriage could cause unnecessary additional empty backhauls, vehicle mileage, and fuel consumption. Although the energy

[53] See pp. 16-17 and 36-37, also n. 18.

[54] 49 U.S.C. § 10102(14) defines "motor private carrier".

[55] U.S. Federal Energy Administration, "Potential Fuel Conservation Measures by Motor Carriers in the Intercity Freight Market", Vol. 1, March 1977, Washington, D.C.

impact of allowing owner-operators to lease equipment to private carriage has never been specifically examined, it is expected that the proposed action will reduce empty backhauls, net vehicle mileage, and fuel consumption. Attendant to the reductions in vehicle mileage will be a slight reduction in truck-related accidents, noise, and air pollution. No other energy consumption or environmental impacts are expected.

This analysis presumes that owner-operator flexibility will not be unduly restricted in their agreements with private carriers. Such contractual restrictions could cause operating inefficiencies and increased energy consumption.

Decided: February 9, 1982.

By the Commission, Chairman Taylor, Vice-Chairman Gilliam, Commissioners Gresham and Clapp. Commissioner Gresham concurred in part and dissented in part and reserves the right to submit a separate expression which will be issued in a notice.

JAMES H. BAYNE
Acting Secretary

[SEAL]

APPENDIX A

Comments received in Ex Parte No. MC-122 (Sub-No. 2)

Individuals

Jim Sanot	Easton, PA
C. Tim Stoughton	Lancaster, OH
James W. Blackburn	N. Wilkesboro, NC
Ron Rebideau	Plymouth, VT
Ray Anderson	Greenville, OH
Randy E. Anderson	Lancaster, OH
Troy A. Hill	Federal Way, WA
Thomas J. & Joanne T. Kennedy, Jr.	Hackettshown, NJ
Lawrence E. Dellinger	Arlington, VA
R. Terry Stoughton	Not given
Phil L. Noland	Not given
Louis W. Scruggs	Not given
Eric E. Matchette, III	Mission Hills, KS
Jim Shaw	Salt Lake City, UT
Les Zimmermann	Youngstown, OH
Joe Hess	Greenville, OH
Alfred E. Bakos	Porter, IN
Tony A. Taylor	Bristol, TN
Donald A. Hayes	Merrillville, IN
Ted Obolsky	Passaic, NJ
Brian Obolsky	Passaic, NJ
Bill Hodge	Holdmdel, NJ
Ed Koch	E. Rutherford, NJ
Jeff Mauksa	Passaic, NJ
John J. Dean	Passaic, NJ
Robert J. Dudek	Fairfield, NJ
Mark Thaugas	Holmdel, NJ
Richard Deview	Wayne, NJ
James Cook, Jr.	Jeffrey, NH
Perry D. Daniels	Harrisonville, PA
Clara L. Bowen	Greenville, NC

Ronnie G. Black	Birmingham, AL
David & Catherine Fredericksen	Neenah, WI
Ray McCallister	Sandy Lake, PA
Frank Haines	Connellsville, PA
Billy C. Usery	Guntersville, AL
Gail A. Dowds	Augusta, GA
Robert Shaw	Portland, ME
Robert E. Kramer	Rice's Landing, PA
Warren R. Shafer	Columbus, OH
Bob Cain	Walla Walla, WA

Shippers/Private Carriers

Monsanto Company
Mills & Nebraska Lumber
Dayco Corporation
Speciality Auto Sales, Inc.
Midland Cooperatives, Inc.
Northwestern Steel and Wire Company
TRW, Inc.
Onan Corporation
Nucor Corporation
Surrette Storage Battery Co., Inc.
Cook Paint and Varnish Company
B-D Oil Company
Anchor-Hocking Corporation
Hunt-Wesson Foods, Inc.
Slaughter Brothers, Inc.
J.R. Industrial Corporation
J.C. Penney Company, Inc.
Hill-Rom Company, Inc.
The Pillsbury Company
Boise Cascade Corporation
Union Camp Corporation
Exide Corporation
Comet Rice, Inc.
Geo. A. Hormel & Co., Oscar Mayer & Co., and The Rath Packing Company (jointly)

Nekoosa Papers, Inc.
Chattanooga Brick and Tile, Inc.
Amoco Oil Company
Petrolane, Inc.
Black & Decker Mfg. Co. (Appearance at oral hearing only)

Carriers

Ellerbrock Trucking, Inc.
Silvey Refrigerated Carriers, Inc./Rand Leasing Corporation, Inc.
Ranger Division, Ryder Truck Lines, Inc.
Schilli Motor Lines, Inc.
Louis J. Capolino Trucking
Old Dominion Freight Lines, Inc. & Deaton, Inc. (jointly)
Bowman Transportation, Inc., Floyd & Beasley Transfer Co., Inc., Bruce Johnson Trucking Co., Inc., and R.J. Taylor and G.G. Taylor Co. (jointly)
Mason & Dixon Lines, Inc.
Chandler Trailer Convoy, Inc.
Watkins Motor Lines
Cooper Motor Lines, Inc.
East Texas Motor Freight Lines, Inc.
Blalock Truck Lines, Inc., F.J. Boutell Driveway Co., Inc., J.N. Carr Transport, Inc., L-J-R Hauling, Incorporated, Milk Tank Lines, Inc., National Transportation Services, Inc., & Underwood & Weld Co., Inc., (jointly).
Crete Carrier Corporation, Shaffer Trucking, Inc., and Sunflower Carriers, Inc. (jointly).
C & H Transportation Co., Inc., Frank Bros. Trucking Co., and J. H. Rose Truck Line, Inc. (jointly).
Alvan Motor Freight, Inc., Earl C. Smith, Inc., Jones Transfer Company, McDuffee Motor Freight, Inc., Parker Motor Freight, Inc., Transamerican Freight Lines, Inc., United Trucking Service, Inc., United Trucking of Kentucky, Inc., and White Star Trucking, Inc.
Interstate Motor Freight System, Steel Division

Daily Express, Inc. and Samuel J. Lansberry, Inc. (jointly).
Commercial Carrier Corporation and Clay Hyder Trucking Lines, Inc. (jointly).
Kephart Trucking Company
Wenham Transportation, Inc.
Leaseway Transportation Corp.
J & P Trucking Co., Inc.
Tajon, Inc.
Yellow Freight System, Inc.
Ace Doran Hauling and Rigging Co.
W.R. Durand Trucking, Inc.
Key Way Transport, Inc., Wisconsin Pacific Express, Inc., Zipco Trucking, Inc., Coldway Food Express, Inc., Builders Transportation Co., Leo J. Umerley, Inc., Roadhound Truck Company, R.G.C. Cargo Carriers, Inc., Pinto Trucking Service, Inc., G.G. Parsons Trucking Co., J.M.C. Transport, Inc., H & M Motor Lines, Fall River & New Bedford Express Co., Inc., Direct Courier, Inc., Command Cargo Corporation, Mmar Transportation, Inc., Galveston Truck Lines Corp., The Terminal Corporation, MAC of Wisconsin, Inc. (jointly).
Schneider Transport, Inc., Schneider Tank Lines, Inc., Trans-National Truck, Inc., Distribution Service System, Inc., WNI, Inc., and National Bulk Transport, Inc. (Jointly).
Kale Transport, Inc.
Dahlsten Truck Line, Inc.
Senn Trucking Company
W & L Motor Lines, Inc.
Dixie Express, Inc.
Priority Freight Systems, Inc.
Joe Brown Company, Inc.
Monkem Co., Inc.
Artim Transportation System, Inc.
Herzog Trucking Company, Inc.
Hahn Trucking Line, Inc.

AID Incorporated
Arrow Truck Lines, Inc., Hi-Way Dispatch, Inc.
Bob Witaker & Son
Frozen Food Express, Inc.
Unidentified Carrier comment submitted by Sam Zuzich
Arrow Transfer & Storage Company
Motek Transport, Inc.
Yeary Transfer Company
General Delivery Incorporated
Midwest Emery Freight System, Inc., Little Audrey's Transportation Co., Inc., Belford Trucking Co., and Trans-Cold Express, Inc. (jointly).
Refrigerated Transport Co., Inc., and Coastal Transport & Trading Co. (jointly).
Charter Express, Inc., Hedrick Associates, Inc., Import Dealers Service Corporation, North Alabama Transportation, Inc., Osborne Truck Line, Inc., Port Norris Express Co., Inc., Wiley Sanders Truck Lines, Inc., Senn Trucking Company, Southern Intermodal Logistics, Inc., The Service Transport Co., Victory Freight-way System, Inc. (jointly).
Michigan & Nebraska Transit Co., Inc., and Pulley Freight Lines, Inc. (jointly).
Ryder Truck Lines, Inc.
Osterkamp Trucking Inc.
Matlack, Inc. (Appearance at oral hearing only)
Melton Truck Lines, Inc.
Stewart Trucking Company, Inc.

Associations and Others

Walter C. Gleba, Jr.
Chamber of Commerce, Fargo, ND
Independent Truckers Association (Arizona Chapter)
Independent Truckers Association (South Dakota Chapter)
Independent Truckers Association (Ohio Chapter)
Independent Truckers Association (Indiana Chapter)
Independent Truckers Association (Colorado Chapter)
Independent Truckers Association (National)

Owner-Operators-Independent Drivers Assn. of America
E. V. Swift
John Gettman
Dump Transport Industries Association
Private Carrier Conference
National-American Wholesale Grocers Association
South Dakota Independent Truckers Assn. (West Chapter)
National Industrial Traffic League
Specialized Carriers and Rigging Association
National Furniture Warehousemen's Association
Regular Common Carrier Conference of the American Trucking Assns., Inc.
Truck Renting and Leasing Association
Steel Carriers' Tariff Association, Inc.
American Movers Conference
Food Marketing Institute
National Agricultural Chemicals Association
Owner Operator Magazine
William Biederman and Irving Klein, Attorneys
U.S. Department of Transportation
Eastern Labor Advisory Association (Cement and Tank Divisions) and Labor Relations Advisory Association (jointly)
Private Truck Council of America, Inc.
American Trucking Associations, Inc.
Truckers Action Conference
National Agricultural Transportation Association
Motor Carrier Lawyers Association
Common Carrier Conference—Irregular Route
International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America
Indiana Farm Bureau Cooperative Association, Inc.
Interstate Commerce Commission, Office of Special Counsel
National Automobile Transporters Association
Texas Citrus Exchange
Sunkist Growers, Inc.

APPENDIX B

The following language, inserted into a lease of equipment and driver(s) between an unregulated lessor and a shipper or private carrier, meets our six minimum criteria for the performance of private carriage by a shipper utilizing unregulated equipment and drivers from a single source, and raises a rebuttable presumption of private carriage, exempt from Commission jurisdiction under 49 U.S.C. 10524(a). Parties may or may not desire to address in the lease other issues characterizing a transportation service, some of which are identified in the decision.

1. The period for which the lease applies shall be for 30 days or more.

2. The equipment subject to the lease shall be exclusively committed to the lessee's use for the term of the lease.

3. During the term of the lease, the lessee shall accept, possess, and exercise exclusive dominion and control over the leased equipment. The lessee shall further assume complete responsibility for the operation of the equipment.

4. The lessee shall maintain public liability insurance, in amounts required by law, or shall otherwise accept responsibility to the public for any injury to persons or damage to property sustained during the performance by it of any transportation with leased equipment and drivers. The lessee agrees to display appropriate identification on all equipment leased by it, showing operation by the lessee during the performance of such transportation.

5. During performance by it of transportation, the lessee shall accept responsibility for, and bear the cost of, compliance with safety and other requirements imposed by the Interstate Commerce Commission, the Department of Transportation (Bureau of Motor Carrier Safety),

and the various State and local requirements. This includes, but shall not be limited to, compliance with drivers' hours-of-service rules, driver licensing, acquisition of applicable permits, and length and weight requirements.

6. The lessee agrees to maintain in effect, throughout the period of the lease, adequate cargo loss and damage insurance coverage covering the property being transported, or to otherwise remain liable for such cargo damage and/or loss.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-5247 & 82-8133

RYDER TRUCK LINES, INC., and
BOWMAN TRANSPORTATION, INC., *et al.*,
Petitioners,

versus

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents.

Petition for Review of an Order of the
Interstate Commerce Commission

[Filed Nov. 17, 1983]

ORDER:

( ) The motion of petitioners, Bowman Transportation and Ryder Truck Lines for ☒ stay ☐ recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

(✓) The motion of petitioners, Bowman Transportation and Ryder Truck Lines for ☒ stay ☐ recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including December 5, 1983, the stay to continue in force until the final disposition of the case by the

Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of _____ for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of _____ for a further stay of the issuance of the mandate is DENIED.

/s/ [Illegible]
United States Circuit Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-5247 & 82-8133

RYDER TRUCK LINES, INC. and
BOWMAN TRANSPORTATION, INC., *et al.*,
Petitioners,

versus

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents.

[Filed Dec. 1, 1983]

Petition for Review of An Order
of the Interstate Commerce Commission

ORDER:

( ) The motion of _____ for ☐ stay ☐ recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of _____ for ☐ stay ☐ recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including _____, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the

Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

(×××) The motion of petitioners, Ryder Truck Lines & Bowman Transportation for a further stay of the issuance of the mandate is GRANTED to and including December 7, 1983, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of _____ _____ for a further stay of the issuance of the mandate is DENIED.

/s/ R. Lanier Anderson
United States Circuit Judge

APPENDIX E

STATUTES

§ 10101. Transportation policy

(a) * * * to ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States, including the United States Postal Service and national defense, it is the policy of the United States Government to provide for the impartial regulation of the modes of transportation subject to this subtitle, and in regulating those modes—

(1) to recognize and preserve the inherent advantage of each mode of transportation;

(2) to promote safe, adequate, economical, and efficient transportation;

(3) to encourage sound economic conditions in transportation, including sound economic conditions among carriers;

(4) to encourage the establishment and maintenance of reasonable rates for transportation without unreasonable discrimination or unfair or destructive competitive practices;

(5) to cooperate with each State and the officials of each State on transportation matters;

(6) to encourage fair wages and working conditions in the transportation industry; and

(7) with respect to transportation of property by motor carrier, to promote competitive and efficient transportation services in order to (A) meet the needs of shippers, receivers, and consumers; (B) allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping public; (C) allow the most

productive use of equipment and energy resources; (D) enable efficient and well-managed carriers to earn adequate profits, attract capital, and maintain fair wages and working conditions; (E) provide and maintain service to small communities and small shippers; (F) improve and maintain a sound, safe, and competitive privately-owned motor carrier system; (G) promote greater participation by minorities in the motor carrier system; and (H) promote intermodal transportation.

(b) This subtitle shall be administered and enforced to carry out the policy of this section.

§ 10102. Definitions

In this subtitle—

(1) "broker" means a person, other than a motor carrier or an employee or agent of a motor carrier, that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation.

(2) "carrier" means a common carrier and a contract carrier.

* * * *

(4) "common carrier" means * * * a motor common carrier, * * *.

(5) "contract carrier" means a motor contract carrier * * *.

* * * *

(11) "motor carrier" means a motor common carrier and a motor contract carrier.

(12) "motor common carrier" means a person holding itself out to the general public to provide motor vehicle transportation for compensation over regular or irregular routes, or both.

(13) "motor contract carrier" means—

* * * *

(B) a person providing motor vehicle transportation of property for compensation under continuing agreements with one or more persons—

(i) by assigning motor vehicles for a continuing period of time for the exclusive use of each such person; or

(ii) designed to meet the distinct needs of each such person.

(14) "motor private carrier" means a person, other than a motor carrier, transporting property by motor vehicle when—

(A) the transportation is as provided in section 10521(a)(1) and (2) of this title;

(B) the person is the owner, lessee, or bailee of the property being transported; and

(C) the property is being transported for sale, lease, rent, or bailment, or to further a commercial enterprise.

(15) "motor vehicle" means a vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used on a highway in transportation, or a combination determined by the Commission, * * *.

§ 10524. Transportation furthering a primary business

(a) The Interstate Commerce Commission does not have jurisdiction under this subchapter over the transportation of property by motor vehicle when—

(1) the property is transported by a person engaged in a business other than transportation; and

(2) the transportation is within the scope of, and furthers a primary business (other than transportation) of the person.

(b) The Commission does not have jurisdiction under this subchapter over transportation of property by motor vehicle for compensation provided by a person who is a member of a corporate family for other members of such corporate family if—

(1) the parent corporation notifies the Commission of its intent or one of its subsidiaries' intent to provide the transportation;

(2) the notice contains a list of participating subsidiaries and an affidavit that the parent corporation owns directly or indirectly a 100 percent interest in each of the subsidiaries;

(3) the Commission publishes the notice in the Federal Register within 30 days of receipt; and

(4) a copy of the notice is carried in the cab of all vehicles conducting the transportation.

(c) In this section, "corporate family" means a group of corporations consisting of a parent corporation and all subsidiaries in which the parent corporation owns directly or indirectly a 100 percent interest.

§ 10526. Miscellaneous motor carrier transportation exemptions

(a) The Interstate Commerce Commission does not have jurisdiction under this subchapter over—

* * * *

(4) a motor vehicle controlled and operated by a farmer and transporting—

(A) the farmer's agricultural or horticultural commodities and products; or

(B) supplies to the farm of the farmer;

(5) a motor vehicle controlled and operated by a cooperative association (as defined by section 1141j (a) of title 12) or by a federation of cooperative associations if the federation has no greater power or purposes than a cooperative association, except that if the cooperative association or federation provides transportation for compensation between a place in a State and a place in another State, or between a place in a State and another place in the same State through another State—

(A) for a nonmember that is not a farmer, cooperative association, federation, or the United States Government, the transportation (except for transportation otherwise exempt under this subchapter)—

(i) shall be limited to transportation incidental to the primary transportation operation of the cooperative association or federation and necessary for its effective performance;

(ii) may not exceed in each fiscal year 25 percent of the total transportation of the cooperative association or federation between those places, measured by tonnage; and

(iii) shall be provided only after the cooperative association or federation notifies the Commission of its intent to provide the transportation; and

(B) the transportation for all nonmembers may not exceed in each fiscal year, measured by tonnage, the total transportation between those places for the cooperative association or federation and its members during that fiscal year;

(6) transportation by motor vehicle of—

(A) ordinary livestock;

(B) agricultural or horticultural commodities (other than manufactured products thereof);

(C) commodities listed as exempt in the Commodity List incorporated in ruling numbered 107, March 19, 1958, Bureau of Motor Carriers, Interstate Commerce Commission, other than frozen fruits, frozen berries, frozen vegetables, cocoa beans, coffee beans, tea, bananas, or hemp, or wool imported from a foreign country, wool tops and noils, or wool waste (carded, spun, woven, or knitted);

(D) cooked or uncooked fish, whether breaded or not, or frozen or fresh shellfish, or by-products thereof not intended for human consumption, other than fish or shellfish that have been treated for preserving, such as canned, smoked, pickled, spiced, corned, or kippered products; and

(E) livestock and poultry feed and agricultural seeds and plants, if such products (excluding products otherwise exempt under this paragraph) are transported to a site of agricultural production or to a business enterprise engaged in the sale to agricultural producers of goods used in agricultural production;

(7) a motor vehicle used only to distribute newspapers;

* * * *

(11) transportation of used pallets and used empty shipping containers (including intermodal cargo containers), and other used shipping devices (other than containers or devices used in the trans-

portation of motor vehicles or parts of motor vehicles);

(12) transportation of natural crushed, vesicular rock to be used for decorative purposes; or

(13) transportation of wood chips.

§ 10527. Written contracts pertaining to certain interstate movements by motor vehicle

(a) Notwithstanding the provisions of section 10526 (a)(6) of this subchapter [1], the Interstate Commerce Commission, in cooperation with the Secretary of Agriculture, shall, where appropriate, require by regulation the use of written contracts for the interstate movement by motor vehicle of property described in such section and for brokerage services to be provided in connection with the interstate movement of such property.

(b) A written contract between an owner or operator of a motor vehicle and a broker, shipper of property, or receiver of property which is required to be used by the Commission under this section shall specify the arrangements, including compensation, with respect to loading and unloading of the property transported under such contract. Whenever the shipper or receiver of the property transported under such contract requires that the operator of the vehicle load or unload any part of the property onto or from the vehicle contrary to any provision of such contract, the shipper or receiver shall compensate the owner or operator of the vehicle for all costs associated with loading or unloading that part of the property. Any person who knowingly violates the preceding sentence is liable to the United States Government for a civil penalty of not more than $10,000 for each violation.

(c) The Commission shall prescribe, by regulation, the minimum requirements and conditions of written contracts required to be used under this section.

§ 10921. Requirement for certificate, permit, or license

Except as provided in this subchapter or another law, a person may provide transportation or service subject to the jurisdiction of the Interstate Commerce Commission under subchapter II, III, or IV of chapter 105 of this title or be a broker for transportation subject to the jurisdiction of the Commission under subchapter II of that chapter, only if the person holds the appropriate certificate, permit, or license issued under this subchapter authorizing the transportation or service.

§ 10922. Certificates of motor and water common carriers

* * * *

(b) (1) Except as provided in this section, the Interstate Commerce Commission shall issue a certificate to a person authorizing that person to provide transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title as a motor common carrier of property if the Commission finds—

(A) that the person is fit, willing, and able to provide the transportation to be authorized by the certificate and to comply with this subtitle and regulations of the Commission; and

(B) on the basis of evidence presented by persons supporting the issuance of the certificate, that the service proposed will serve a useful public purpose, responsive to a public demand or need;

unless the Commission finds, on the basis of evidence presented by persons objecting to the issuance of a certificate, that the transportation to be authorized by the certificate is inconsistent with the public convenience and necessity.

(2) In making a finding under paragraph (1) of this subsection, the Commission shall consider and, to the extent applicable, make findings on at least the following:

(A) the transportation policy of section 10101(a) of this title; and

(B) the effect of issuance of the certificate on existing carriers, except that the Commission shall not find diversion of revenue or traffic from an existing carrier to be in and of itself inconsistent with the public convenience and necessity.

(3) The Commission may not make a finding relating to public convenience and necessity under paragraph (1) of this subsection which is based upon general findings developed in rulemaking proceedings.

(4) The provisions of paragraph (1) of this subsection (other than subparagraph (A)) shall not apply to applications under this subsection for authority to provide—

* * * *

(E) transportation by motor vehicle of food and other edible products (including edible byproducts but excluding alcoholic beverages and drugs) intended for human consumption, agricultural limestone and other soil conditioners, and agricultural fertilizers if—

(i) such transportation is provided with the owner of the motor vehicle in such vehicle, except in emergency situations; and

(ii) after issuance of the certificate, such transportation (measured by tonnage) does not exceed, on an annual basis, the transportation provided by the motor vehicle (measured by tonnage) which is exempt from the jurisdiction of the Commission under section 10526(a)(6) of this title and the owner of the motor vehicle certifies to the Commission annually that he is complying with the provisions of this clause and provides to the Commission such information and records as the Commission may require.

§ 10923. Permits of motor and water contract carriers and freight forwarders

(a) Except as provided in this section and section 10930 of this title, the Interstate Commerce Commission shall issue a permit to a person authorizing the person to provide transportation subject to the jurisdiction of the Commission under subchapter II or III of chapter 105 of this title as a motor contract carrier * * * if the Commission finds that—

(1) the person is fit, willing, and able—

(A) to provide the transportation or service to be authorized by the permit; and

(B) to comply with this subtitle and regulations of the Commission; and

(2) the transportation or service to be provided under the permit is or will be consistent with the public interest and the transportation policy of section 10101 of this title.

(b)(1) A person must file an application with the Commission for a permit to provide transportation as a contract carrier * * *. The Commission may approve any part of the application or deny the application. The application must—

(A) be under oath;

(B) contain information required by Commission regulations; and

(C) be served on persons designated by the Commission.

* * * *

(3) In deciding whether to approve the application of a person for a permit as a motor contract carrier of property, the Commission shall consider—

(A) the nature of the transportation proposed to be provided;

(B) the effect that granting the permit would have on the protesting carriers if such grant would endanger or impair their operations to an extent contrary to the public interest;

(C) the effect that denying the permit would have on the person applying for the permit, its shippers, or both; and

(D) the changing character of the requirements of those shippers.

* * * *

(6) With respect to applications of persons for permits as motor contract carriers of property, the Commission may not make a finding relating to the public interest under subsection (a)(2) of this section which is based upon general findings developed in rulemaking proceedings.

§ 11502. Conferences and joint hearings with State authorities

(a)(1) In carrying out this subtitle as it applies to a class of persons providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under subchapter I, III, or IV of chapter 105 of this title, the Commission may—

(A) confer and hold joint hearings with the State authorities having regulatory jurisdiction of that class when the conference or hearing is related to an investigation of the relationship between rate structures and practices of carriers providing transportation or service subject to the jurisdiction of the State authorities and of the Commission, and the Commission may take action as a result of the investigation that may affect the ratemaking authority of a State; and

(B) cooperate with and use the services, records, and facilities of the State authorities.

(2) In carrying out this subtitle as it applies to motor carriers and brokers providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title, the Commission may—

(A) confer and hold joint hearings with State authorities;

(B) cooperate with and use the services, records, and facilities of State authorities; and

(C) make cooperative agreements with a State to enforce the economic laws and regulations of a State and the United States concerning highway transportation.

(b) When an investigation under this subtitle involving a common carrier providing transportation or service subject to the jurisdiction of the Commission under sub-

chapter I or IV of chapter 105 of this title, is about a rate, classification, rule, or practice of a State, the Commission shall notify the interested State of the proceeding before disposing of the issue.

(c) When a representative of a State authority sits with the Commission in an investigation about a carrier subject to the jurisdiction of the Commission under subchapter I or III of chapter 105 of this title, the representative may be given an allowance for travel and subsistence expenses. The Commission may determine the amount of the allowance.

§ 11506. Registration of motor carriers by a State

(a) In this section, "standards" and "amendments to standards" mean the specification of forms and procedures required by regulations of the Interstate Commerce Commission to prove the lawfulness of transportation by motor carrier referred to in section 10521(a)(1) and (2) of this title by—

(1) filing and maintaining certificates and permits issued to the motor carrier by the Commission;

(2) registering motor vehicles operating under the certificates and permits;

(3) filing and maintaining proof of required insurance-coverage or qualification as a self-insurer; and

(4) filing the name of a local agent for service of process.

(b) The requirement of a State that a motor carrier, providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title and providing transportation in that State, register the certificate or permit issued to the carrier under section 10922 or 10923 of this title is not an unreasonable burden on transportation referred to in section 10521

(a)(1) and (2) of this title when the registration is completed under standards of the Commission under subsection (e) of this section. When a State registration requirement imposes obligations in excess of the standards, the part in excess is an unreasonable burden.

(c)(1) The Commission shall maintain standards and amendments to standards (A) prepared and certified to it by the national organization of the State Commissions, and (B) prescribed by the Commission. If the national organization determines to withdraw entirely standards prescribed by the Commission, the Commission shall prescribe new standards by the end of the first year after the national organization determines to withdraw the standards.

(2) An amendment to the standards prepared and certified by the national organization and prescribed by the Commission is effective when the amendment is prescribed or at another time as determined by the national organization.

(d) The national organization shall consult with the Commission and representatives of motor carriers subject to the State registration requirement when preparing amendments to the standards. Different amendments may be prescribed for each class of motor carriers as warranted by the differences in the operations of each class.

(e) This section does not—

(1) authorize standards in conflict with regulations of the Commission; or

(2) affect the authority of the Commission to interpret its regulations and certificates and permits issued under section 10922 or 10923 of this title.

REGULATIONS

49 C.F.R. § 1023.11 When registration required.

Whenever a State requires a motor carrier to file and maintain a current record of its authority issued by the Interstate Commerce Commission permitting operation within the borders of such State, such motor carrier shall not exercise such authority within the borders of such State unless and until there shall have been filed with and approved by the commission of such State an application for the registration of such authority as prescribed by the provisions of this subpart, and there shall have been a compliance with all other requirements of this subpart: *Provided, however,* That a motor carrier shall only be required to file with such State commission that portion of its authority permitting operation within the borders of such State; *And provided further,* That a motor carrier shall not be required to file with such State commission an emergency or temporary operating authority having a duration of 30 consecutive days or less if such carrier has: (a) Registered its other authority and identified its vehicles or driveaway operation under the provisions of these standards; and (b) furnished to the State commission a telegram or other written communication describing such emergency or temporary operating authority and stating that operation thereunder shall be in full accord with the requirements of these standards.

49 C.F.R. § 1023.31 When registration and identification required.

Whenever a State requires a motor carrier to register and identify any vehicle (other than one used in driveaway operations) as operating under its authority issued by the Interstate Commerce Commission permiting operation within the borders of such State, or whenever a State requires a motor carrier, engaged in driveaway operations, to register and identify such operations as being conducted under its authority issued by the Interstate

Commerce Commission permitting the conduct of same within the borders of such State, such motor carrier shall not operate such vehicle or engage in such driveaway operations under such authority within the borders of such State unless and until the vehicle or driveaway operations shall have been registered with the commission of such State in accordance with the provisions of this subpart, and there shall have been a compliance with all other requirements of this subpart.

49 C.F.R. § 1023.103 Violations declared unlawful; criminal penalties; civil remedies.

Any violation of the provisions of these standards is hereby declared to be unlawful. Nothing in these standards shall be construed to prevent a State from imposing criminal penalties upon any person or organization violating any provision of these standards or from providing or applying civil remedies or sanctions in connection with such violations.